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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 1, Original

THE STATE OF MARYLAND, COMPLAINANT,

vs.

THE STATE OF WEST VIRGINIA.

MOTION BY COMPLAINANT TO SET CAUSE FOR HEARING AND CONSENT OF DEFENDANT THERETO.

ISAAC LOBE STRAUS,
Attorney General of Maryland, for Complainant.
WILLIAM G. CONLEY,
Attorney General of West Virginia, and
GEORGE E. PRICE,
For Defendant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 1, Original.

THE STATE OF MARYLAND

versus

THE STATE OF WEST VIRGINIA.

To the Honorable the Judges of the Supreme Court of the United States:

The State of Maryland, the plaintiff in the above cause, by Isaac Lobe Straus, its Attorney General, respectfully moves that the above cause be set down for argument and hearing at some day which may be convenient to this court during its October term of the year nineteen hundred and nine (1909). The said cause is number one on the original docket of this court.

Your petitioner also shows that the deponent, The State of West Virginia, assents and concurs in this application on the part of The State of Maryland, a copy of said assent being annexed hereto as part hereof and is marked Exhibit A, and as in duty, etc.

ISAAC LOBE STRAUS,
Attorney General of the State of Maryland.

The State of West Virginia, by her Attorney General Wm. G. Conley, joins in the motion of The State of Maryland.

WM. G. CONLEY,
Attorney General for State of West Virginia.

MAY 17, 1909.

EXHIBIT A.

Price, Smith, Spilman & Clay, Attorneys & Counsellors at Law, Bradford Building.

Geo. E. Price, Harrison B. Smith, Robert S. Spilman, Buckner Clay, R. Parke Flournoy, J. Edmund Price, R. M. Price.

CHARLESTON, WEST VIRGINIA, *April* 16, 1909.

Hon. ISAAC LOBE STRAUS,
Attorney General, Baltimore, Md.

DEAR SIR: We concur in your proposed motion, to be made before the Supreme Court of the United States, to have the suit of The State of Maryland *v.* The State of West Virginia, No. 1, original, set down for argument on such day during the next term, beginning October 1, 1909, as the court shall think proper to fix.

Yours very truly, GEO. E. PRICE,
Assistant Counsel for West Virginia.

[Endorsed:] State of Md. *v.* State of West Va. Exhibit A. Mr. Clerk: Please file. Isaac Lobe Straus, Attorney General of Maryland.

[Endorsed:] In the Supreme Court of the United States. The State of Maryland *v.* The State of West Virginia. Motion to set down for hearing and argument. Mr. Clerk: Please file. Isaac Lobe Straus, Attorney General of Maryland.

[Endorsed:] Supreme Court U. S. October term, 1908. Term No. 1, original. The State of Maryland, complainant *vs.* The State of West Virginia. Motion by complainant to set case for hearing and consent by defendant thereto. Filed May 17, 1909.

THE STATE OF MARYLAND,

vs.

THE STATE OF WEST VIRGINIA.

In the
Supreme Court
of the United States.
In Equity.
OCTOBER TERM, 1909.
NO. 1, ORIGINALS.
Assigned for Argument October 25, 1909.

BRIEF FOR THE STATE OF MARYLAND.

STATEMENT OF THE CASE.

This cause was instituted by the State of Maryland against the State of West Virginia, under and by virtue of the provisions of Chapter 563 of the Acts of the General Assembly of Maryland, passed at January Session, 1890, which is in the words following, to wit:

AN ACT to authorize and direct the Attorney-General of the State to take such steps as may be necessary to obtain a decision of the Supreme Court of the United States, which will settle the controversy between the States of Maryland

and West Virginia concerning the true location of that portion of the boundary line, between the two States, lying between Garrett County, Maryland, and Preston County, West Virginia, and to appropriate a sum of money therefor.

SECTION 1. Be it enacted by the General Assembly of Maryland, That the Attorney-General of the State be and he is hereby authorized and directed to take as speedily as possible, such steps as may be necessary to obtain a decision of the Supreme Court of the United States which will settle the controversy between the States of Maryland and West Virginia over and concerning, and which will finally fix and determine the true location of that portion of the boundary line between said States lying between Garrett County in the State of Maryland and Preston County in the State of West Virginia.

SECTION 2. And be it enacted, That the sum of five hundred dollars is hereby appropriated for the payment of the costs of said suit, and on the certificate of the Attorney-General, the Comptroller shall issue his warrant on the Treasurer for the same out of any funds not otherwise appropriated.

SECTION 3. And be it enacted, That this Act shall take effect from the date of its passage.

Approved, April 8, 1890.

As stated in said Act of Assembly, the purpose of this case is to obtain, through a decision of this Court, a settlement of the controversy between the State of Maryland and the State of West Virginia, over and concerning and which will finally fix and determine the true location of that portion of the boundary line between said States lying between Garrett County in the State of Maryland and Preston County in the State of West Virginia.

Preston County, West Virginia, was erected out of a portion of Monongalia County under an Act of the General Assembly of Virginia, passed in the year 1818.

Garrett County, Maryland, was erected out of the western portion of Allegany County under and by virtue of the provisions of Chapter 212 of the Acts of the General Assembly of Maryland of 1872.

Charter of Maryland.

On the 20th day of June, 1632, Charles First, King of England, granted to Cecilius Calvert, Baron of Baltimore, a charter for the Province of Maryland.

By reference to that part of the Charter covering the calls of the boundaries of the Province, as exhibited with the original bill in this case, it will be seen that the boundaries were clearly defined, and laid down with a degree of precision that was unusual at the time of this grant.

The calls in the Charter to the Proprietary of Maryland to which the attention of the Court is directed in this cause, and upon which it is prayed to pass its judgment and render its decree, are as follows:

> "Going from the said estuary called Delaware Bay, in a right line in the degree aforesaid to the true meridian of the first fountain of the river Potomac, then tending downward towards the south to the farther bank of the said river, and following it to where it faces the western and southern coast," etc.

The grantee, Lord Baltimore, accepted this Charter and took possession thereunder and he and his descendants, as the Lords Proprietary, exercised jurisdiction, government and control until the Revolution, when Maryland became a Sovereign State and a member of the American Union, and all

rights, both proprietary and political, previously granted under the Charter, became vested in the State of Maryland.

Fairfax Grant.

The territory comprising all that section known as the Northern Neck of Virginia, became vested by letters patent issued by James Second, King of England in Thomas, Lord Culpepper, and upon the death of Lord Culpepper, the title to said territory vested in Thomas, Lord Fairfax, Baron, of Cameron, as heir-at-law.

This grant of the Northern Neck of Virginia, was made by the King in right of the Crown, the Colony of Virginia being a Royal Government and the English Crown possessing the territory, dominion and sovereignty of the same.

The Northern Neck of Virginia was described in the Charter therefor as comprising all that tract, territory or portion of land in America bounded by, and within the heads of Tappahannock alias Rappahannock and Querrough or Potomac Rivers, the courses of these rivers and Chesapeake Bay, etc.

It will at once be perceived that the calls in this grant were not made with the same degree of precision as those contained in the Charter for the Province or Colony of Maryland, as the western or southern boundary of the grant was left open to location, to be fixed according to the opinions of whoever might be selected to determine the same.

This western or southern line dividing the Northern Neck from the Colony of Virginia never having been run or located, disputes and controversies arose between the Royal Government of Virginia and Lord Fairfax in relation to their conflicting territorial claims.

This conflict of authority and jurisdiction having existed for a number of years, on the 29th day of November, 1733, the King in Council passed an order directing the Lieut.

Governor of Virginia to nominate three or more commissioners (not exceeding five) to meet a like number to be named by Lord Fairfax, for the purpose of surveying and settling the marks and boundaries of the territory agreeably to the terms of the patent under which Lord Fairfax claimed, such appointment to be made within two years after the arrival of the order.

Fairfax Stone.

In 1733, commissioners were appointed on behalf of the Colony of Virginia, and Lord Fairfax also appointed commissioners, and these having met and determined upon the course of procedure to be followed, a survey of both the Potomac and Rappahannock was begun and finished the following year, but it was not until 1746 that the line from the head of the Rappahannock to the head of the North branch of the Potomac River, as fixed by these commissioners, was located, and the "Fairfax Stone" was set up at the point determined upon as the head of the North branch of the Potomac River, it being intended by this line to bound the territory of Lord Fairfax and to separate the same from the territory of the Colony of Virginia.

Fairfax Stone Established Without Lord Baltimore's Knowledge.

Lord Baltimore was not a party to this controversy, and his attention was not directed to these surveys and of the running of this line. About the year 1753, knowledge of what had been done was conveyed to his successor through his Colonial Governor, who at once brought the matter to the attention of the Proprietary. (Record, page 544 and also page 546.)

At the time the "Fairfax Stone" was established as a boundary between Lord Fairfax and the Colony of Virginia, Charles Calvert was the Proprietary of Maryland, and died

without knowledge of what had been done by the joint commission of the Royal Government of Virginia and Lord Fairfax, looking to the settlement of their conflicting interests and territorial claims, and, as above stated, the first knowledge of this matter was brought to the attention of Frederick the successor of Charles, in 1753, who at once protested against what he considered to be an invasion of his rights and of his territory, claiming as he did, jurisdiction to the head of the South branch of the Potomac River which extends much farther to the west than the Northern branch.

Governor Sharpe of Maryland at once communicated the remonstrance of Lord Baltimore to Lord Fairfax, and denied the right of the latter to invade the territory of his principal, and asserted Lord Baltimore's claim of territory and jurisdiction to the South branch of the Potomac River. (Record, pages 541 and 542. See Appendix A.)

By his letter dated the 24th day of September, 1753, Lord Fairfax observed that he perceived Lord Baltimore designed to dispute which was the head spring of the Potomac River, the South or the North branch as run out between His Majesty and himself and that the South branch would be much to his advantage, and he therefore thought it improper for him to appear in any proceeding relative thereto, and that the Governor of Virginia, who represented the English Crown and the Governor of Maryland should transact the affair; and that if Lord Baltimore secured his demands, he, Lord Fairfax, would insist upon a new line between His Majesty and himself to the southward, and repeated that he considered the South branch much to his advantage.

This statement was made by Lord Fairfax after the surveys of both the Rappahannock and Potomac had been made by his commissioners acting in conjunction with those of the Governor of Virginia.

No record exists of any proceeding relative to the settlement, or even discussion of the matter of the western boundary of the Province, by the constituted authorities of Maryland and Lord Fairfax between 1753 and 1776.

But it appears, that about 1771, the Governor of Maryland appointed commissioners with authority to proceed to the head of the South branch of the Potomac, to ascertain its most western fountain, to establish a meridian and to learn the relative bearings to the west of the first fountain of the North and of South branches of the river, and this was done and the report of said commissioners was made and returned and filed among the Archives of the Colony.

The result of this survey proved that the first fountain of the South branch of the Potomac River was the farthest to the west and that a meridian drawn north from that source would be many miles west of a meridian drawn from the head of the North branch of the river.

The Revolution put an end to the claims of both Lords Baltimore and Fairfax to the territory in question, and devolved upon the States of Maryland and Virginia the necessity of settling the controversy which had arisen and which was left open and undetermined at the time the rights of the Proprietaries of both Maryland and the Northern Neck of Virginia were extinguished.

Recognition by Virginia of Maryland's Rights.

By the first Constitution of Virginia, adopted on the 29th day of June, 1776, it was declared that:

> "The territories contained within the Charters erecting the Colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released and forever confirmed to the people of those Colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever, which might at

any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potomack and Pocomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon."

This was an express recognition of the right of the people of Maryland to all the territory embraced within the boundaries of the Charter granted to Lord Baltimore in 1632, and was a renunciation and surrender of any claim which might have been theretofore made by either Lord Fairfax or the Government of Virginia to any of such territory.

Maryland's Assertion of Her Rights.

And almost contemporaneously the first Constitutional Convention of Maryland, held October 1776, adopted a resolution as follows:

"Resolved unanimously, that it is the opinion of this Convention that the State of Virginia hath not any right or title to any of the territory, bays, rivers or waters, included in the Charter granted by his Majesty, Charles, the first, to Cecilius Calvert, baron of Baltimore.

"Resolved unanimously, that it is the opinion of this convention, that the sole and exclusive jurisdiction over the territory, bays, rivers and waters included in the said Charter, belongs to this State; and that the river Potowmack, and almost the whole of the river Pocomoke, being comprehended in the said Charter, the sole and exclusive jurisdiction over the said river Potomac, and also over such part of the river Pocomoke as is comprehended in the said Charter, belongs to this State."

Virginia having expressly recognized the title of the State of Maryland to all the territory embraced within the Charter

to Lord Baltimore, and Maryland having asserted her right to said territory, as shown by the above resolution, the question was open and stood as it originally existed, when first raised by the Lord Proprietary of Maryland in 1753 when he learned of the planting of the "Fairfax Stone."

The State of Maryland has uniformly and persistently maintained by legislative declarations and proceedings, that its true western boundary is to a meridian line drawn from the first fountain of the Potomac River, to the Pennsylvania line, and this claim of territory and jurisdiction found expression in the several Resolutions and Acts of Assembly passed in the years, 1788, 1795, 1796, 1801, 1810, 1832, 1834, 1852, 1886 and 1890.

That Virginia also considered it an open question is evidenced by the passage of Acts of Assembly and Legislative resolutions in the years, 1821, 1832 and 1853, and that West Virginia, the present defendant, has also considered it an open question, is evidenced by her Acts of Assembly passed in the years 1868 and 1887, all of which Acts of Assembly are incorporated and referred to in the Record of this case.

Leaving out of consideration, so far as the matter of location is concerned, any question as to the first fountain of the South branch of the Potomac River, and confining the matter of location to the first fountain of the North branch of the Potomac River, it will be seen by reference to the plat filed on behalf of the plaintiff that the North branch of the Potomac River *west of the meridian drawn north from the "Fairfax Stone,"* branches or forks, one, the southerly, fork being designated thereon, as "Fairfax Run," and the other fork marked "Potomac River," and that the branch marked Potomac River takes its rise in the spring marked "Potomac Spring" upon the plat, which spring will be seen to be near the summit of the Backbone Mountain.

INSTRUCTIONS TO MARYLAND SURVEYOR.

In making the locations in this cause on behalf of the plaintiff, the following, among other instructions, were given to the surveyor:

1st. Upon the day agreed on for the meeting of the Surveyors at Oakland, Maryland, you will appear at said place, and then proceed to the "Fairfax Stone."

2nd. Upon arriving at said point, you will run, by actual survey, a true North or Meridian line therefrom to the "Mason and Dixon Line," being guided by the Manuel of Surveying Instructions for the Survey of the Public of the United States, as prepared in conformity with law, under the direction of the Commissioner of the General Land Office of the General Government, making such astronomical observations on the ground as may be necessary and proper to secure the desired result.

3rd. You will adopt the latitude and longitude of "Fairfax Stone" as given in the report of Mr. Lee, Commissioner on the part of the State of Maryland, of the work of Lieut. N. Michler, performed in the year 1859.

4th. Should you find that the meridian line running North from "Fairfax Stone," to the "Mason and Dixon Line," crosses any of the waters of the Potomac River, you will locate, by actual survey, such water or waters, from the point where they are respectively crossed by said meridian to their fountain heads.

5th. You will, upon ascertaining by actual survey the westernmost source or first fountain of the Potomac River, plant a stone or mountain at said fountain to mark the same, and from thence you will locate by actual survey, a due North or meridian line to the "Mason and Dixon Line," and in order to secure the greatest degree of accuracy in said location, you will make such astronomical observations on the ground as may be necessary, being guided

in your work by the Manual of Instructions above referred to.

6th. In locating such meridian from the first fountain of the Potomac River, you will take such notes and establish such monuments as may be necessary to definitely mark the same upon the ground, and you will likewise take such barametric readings as will enable you to show in your returns, the contour of the surface of the country through which said line runs.

7th. You will run such lines of levels as will give the actual difference in elevation between the spring at "Fairfax Stone," and the first fountain of the Potomac River, as ascertained by your previous work.

8th. The initial point of the meridian, from the first fountain of the Potomac River to the "Mason and Dixon Line," shall be taken as the base of your future work.

9th. You will determine the magnetic declination at the "Fairfax Stone" and at the other points upon the meridian lines to be run by you to the "Mason and Dixon Line."

10th. You will further counter-locate the line located by the State of West Virginia in the year 1894, under a stipulation in this cause, by means of off-sets from said meridian lines.

11th. You will take reference to points in other lines which witnesses, produced upon the ground, may point out and claim as being in an old line run prior to the year 1859, or as marking any supposed boundary between the States of Maryland and West Virginia.

12th. You will also locate, by actual survey, the beginning and sufficient of the lines of certain original tracts of land to reach the said meridian line or lines to be run by you and also the beginnings and lines of certain Military Lots; said tracts and lots to be located according to their original courses, distances and calls, as contained in the

original patents and certificates for the same, and also locate in like manner, certain tracts of land granted by the State of Virginia.

Fairfax Meridian Located.

In execution of the first instruction given to the Surveyor on the part of the plaintiff, to wit: to run a true North or Meridian line from the "Fairfax Stone" to the "Mason and Dixon Line," and to make such astronomical observations as might be necessary and proper to secure the desired result, the survey was begun at the "Fairfax Stone" and the line marked upon the plat, "Fairfax Meridian" was located. This line is a reproduction of the "Michler Line" run in the year 1859 by Lieut. Michler and hereinafter referred to.

Method of Locating Position of Points.

For the purpose of having a quick and accurate method of locating the true position of any given point upon the ground or upon the plat, the "Potomac Spring" was adopted as a base to which all points are referred, and the position of any point on the plat can be found by its latitude in feet North or South and its departure in feet East or West from "Potomac Spring."

In illustrating of this method of quickly and accurately determining the location of any given point upon the plat referring to "Potomac Spring" as the base, we will take the station on the summit of Backbone Mountain in the "Monroe Line," which by latitude is 7920 feet North and by departure, 6186.6 feet East of "Potomac Spring."

Neither the plaintiff nor any Proprietary of Maryland as its predecessor in title to the territory in question in this case has never admitted that the "Fairfar Stone" stands at the first fountain of the Potomac River, and whatever declarations exist in the title papers to any lands granted by the State of Maryland with reference to the "Fairfax Stone" the same is

always referred to as standing at the point *fixed by Lord Fairfax* as the head of the North branch of the Potomac River.

Steps Taken to Establish the Western Boundary of Maryland.

Prior to the locations made in this case on the part of the plaintiff, no survey had ever been made to determine, either legally or geographically, the relation which the "Fairfax Stone" bears to the head of the North branch of the Potomac River.

In the year 1795, by resolution of the General Assembly of Maryland, Messrs. William Pinkney, William Cooke and Philip Barton Key were appointed commissioners on the part of Maryland to meet such commissioners as might be appointed on the part of Virginia, with power to adjust by compact between the two States, the Western and Southern limits of Maryland and the dividing lines between it and Virginia; and also any claim of either State to territory within the limits of the other; and in the event of agreement, the compact was to be reported to the Legislature for its confirmation.

Mr. Cooke, a distinguished lawyer of Maryland, in his letter declining the position to which he had been appointed, states some important matters bearing upon the question of the first fountain of the Potomac River.

To the Honorable the Senate and House of Representatives of Maryland:

Gentlemen:—

By a resolve of the Legislature, passed at the last session, William Pinkney and Philip Barton Key, Esquires, together with myself, were "Appointed commissioners on the part of this State to meet" such commissioners as might be appointed

for the same purpose by the commonwealth of Virginia, to settle and adjust, by mutual compact between the two governments, the Western and Southern limits of this State, and the dividing lines and boundaries between this State and the said Commonwealth; and also to settle and adjust any claim of this State, or the said commonwealth, to the territory within the limits of the other.

In execution of this trust, I have thought it my duty, not only to acquire authentic information of the nature of the possessions held under the Virginia grants of land, within the limits claimed by this State, but also to examine carefully the laws of nature and nations, that it might be known how far those laws would affect the claim of this State, before such claim was formally made, or prosecuted, in case it could not be otherwise adjusted by an amicable settlement.

The true boundary between this State, and the State of Virginia, depends on the "single" question, which is the first fountain of the river Potomac?—a question which has hitherto rested upon opinion only, without any effectual step having been taken to ascertain the same. Many years ago, the late Thomas Cressap was employed by the proprietor of Maryland to explore the country, and to report the facts that might lead to a decision on this subject; but the country then being little known, and in the possession of savages, it is probable he judged more from appearance than from any actual survey of it; he reported in favour of the North branch, and for some time after, that was generally supposed to be the first fountain of the river Potowmack. Afterwards, however, a different opinion prevailed, and the late proprietors of Maryland always claimed the land, and in some instances made grants thereof, lying between the North and South branches of that river. At length, a negotiation commenced between the proprietor of Maryland and Lord Fairfax, the then proprietor of that part of Virginia, respecting this subject; and by consent it would have been established, that the

first fountain of Potowmack was at the head of the South branch of that river, if the crown of Great Britain had not been interested in the question, and therefore it became necessary to lay the circumstance then before the King and Council, and to obtain their approbation and concurrence before any effectual regulation could take place; and while matters were thus suspended, the Revolution commenced, which finally deprived all parties of their interest in the subject.

During the war, the citizens of Virginia began to take up, and immediately after the peace to settle, the land between the North and South branches of Potowmack; and the whole of that country, containing 462,480 acres of land hath ever since been and now is, occupied and claimed by the State of Virginia, or persons holding under grants issued by that State. But if upon a full investigation of this subject it shall be found that the first fountain of Potowmack is at the head of the North branch of that river, still it is of essential consequence to this State, to have the real head of fountain of that branch of the river fixed and well ascertained.

There are three springs or small rivulets, that unite after running a small distance; and the possessions under the title of this State are at present confined to a meridian line drawn from the most southern of those springs, and the lands to the westward of that meridian line are taken up and held under grants issued by the State of Virginia, although both the other springs extend further to the westward, and one of them near three miles. Should this last mentioned spring be deemed the first fountain from whence a meridian line is to be drawn for our western boundary, it will give a country in addition to what the State now possesses, of three miles broad, and upwards of thirty miles in length.

On reviewing the law of nature and nations, it will be found, that prior occupancy can give no title to Virginia in this instance; nor any length of time bar the claim of this

State if it is otherwise well-founded. Political laws in this, and in most other countries, regulate this subject among the citizens of their respective States; but it cannot be done between independent governments, unless by treaty.

Should the Legislature of this State persist in the wish to settle the bounds of this State and Virginia, in the manner proposed by the resolve of the last session (and which has been delayed by the State of Virginia, not having made any appointment of commissioners for that purpose), it will be necessary to appoint another commissioner in the place of Mr. Pinkney, who is now absent on public business, and some other person instead of myself, as it will not be convenient to me to attend further to the subject.

WILLIAM COOKE.

14th November, 1796.

The most southern of the three springs referred to in the letter of Mr. Cooke, is that heading at "Fairfax Stone," while the spring referred to as the one heading *farthest to the west* is the one designated "Potomac Spring" upon the plat of the State of Maryland in this cause, and is the point from whence the meridian line is drawn for the western boundary of Maryland according to her claims and pretentions in this cause.

Mr. Cooke having declined the appointment, and Mr. Pinkney having left the country on a foreign mission, in 1796, Charles Carroll of Carrollton and Jeremiah Townley Chase were appointed in their stead. Mr. Key removed from the State and Messrs. Carroll and Chase having declined to accept Messrs. Duvall, McDowell and Nelson were appointed commissioners and the question at issue became the subject of correspondence between Governor Mercer of Maryland and Governor Monroe of Virginia.

The General Assembly of Virginia passed a resolution authorizing the appointment of commissioners to meet those

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on the part of Maryland but limiting their powers to the adjustment of the western line, and Governor Mercer, realizing that such limitation of authority was not responsive to the authority given to the commissioners on the part of Maryland, did not pursue the discussion or correspondence any further, so that the negotiation ended. At December session, 1803, this correspondence and the acts and resolutions of the two States to which it related, were referred to the consideration of a committee of the House of Delegates of Maryland, by whom a report was made, recommending the running of a provisional boundary line (by agreement with Virginia), to start from the extreme western source of the North branch, which should be held to be the boundary line of the two States, until further and definite measures could be taken to ascertain the southern boundary. This report was not acted upon, and the subject does not appear to have been revived until 1810, when another resolution was passed similar to that of 1803, under which nothing was done; and the subject again slept until it was revived by Maryland in the Act of 1818, Chap. 206.

The State of Maryland had now become wearied with efforts to reclaim the territory south of the North branch; and hence this Act of 1818, in proposing to Virginia the appointment of commissioners, agreed to adopt the most western source of the North branch, as the point from which the western boundary should start. At December Session, 1821, of the Assembly of Virginia, an Act was passed, which purported to meet and reciprocate this proposition of the State of Maryland, but was, in fact, materially variant from it. The Virginia Act, in fact, begged the whole question, and left nothing open for negotiation. The Act itself undertook to determine the point from which the line should start, and left nothing to the commissioners but the power of locating it in conformity to its instructions. They were specially instructed to commence the western boundary at a stone planted

by Lord Fairfax on the head waters of the Potomac; and thus they were tied down to the old adjustment between Fairfax and the Crown. The Virginia Act was therefore entirely different from that of Maryland, which directed the commissioners to begin at the most western source of the North branch, be that where it might; and being thus dissimilar, it did not justify the appointment of commissioners on the part of Maryland. Our Act of 1818 expressly directed, that the appointment, on the part of this State, should be made only after Virginia had accepted its propositions by the passage of a similar Act; and no Act could be considered similar, which did not confide to their commissioners the same powers of adjustment and adopt the same basis of settlement. This was, however, inadvertently overlooked by the Executive of Maryland; and commissioners were appointed on the part of both States, who assembled on the head waters of the North branch in the summer of 1824. Upon the instant of their assemblage it was discovered that the fixed and positive instructions to the Virginia commissioners arrested all further proceedings. The Maryland commissioners came instructed to locate the western meridian from the most western source of that branch, while those on the part of Virginia were limited to Fairfax's location, without regard to the true and actual source of the river. Fairfax's stone is not in fact planted at the western source; and even had it been so situate, it was not consistent with the rights and dignity of Maryland to have entered into an adjustment with Virginia commissioners who were thus restricted without regard to the question of right. Maryland having by her Act offered to relinquish all claim to the territory south of the North branch, it was not to be expected after this concession, that she should adopt as the source of that branch a point determined as such by her interested adversaries during the progress of the controversy. The spirit of amity and concession, which had characterized all her proceedings in her repeated efforts to close this con-

troversy, had been met at every step by obstinate adherence on the part of Virginia to the full extent of her pretended claims; and it did not become her as a State to submit herself supinely to any terms which the latter might dictate. Her commissioners therefore properly insisted that the whole question as to the true source of the North branch should be thrown open for investigation; and this being declined the negotiation ended.

Suit Filed in This Court.

On October 20, 1834, the State of Maryland filed its bill in the Court against the State of Virginia for the purpose of having this Court determine and settle the dispute with regard to its western and southern boundary. After the filing of said bill, information to the effect that Maryland had misapprehended the terms and provision of the Act of Virginia of 5th of March, 1833, was received, and thereupon at the next meeting of the Legislature of Maryland, in 1835, a special committee to whom had been referred that part of the executive message relating to the southern and western boundaries of the State, made its report to the General Assembly and recommended that the suit above referred to be discontinued and the bill dismissed. This recommendation was clearly based upon the belief and understanding of the committee that if said suit was discontinued the State of Virginia would unite with the State of Maryland in amicably adjusting said boundaries in accordance with the rights of the respective parties.

All plans for the settlement of this question, however, were afterwards again frustrated by the assertion of Virginia that the Fairfax Stone marked the first fountain of the Potomac and that she would not consent to any adjustment which would acknowledge any other point as the one through which the meridian making the western boundary of the State of Maryland was to be drawn.

MICHLER LINE RUN.

Prior to the year 1859, when Lieut. Michler, under the joint direction of Messrs. Lee and McDonald, Commissioners appointed to represent the States of Maryland and Virginia, respectively, to fix and determine the western boundary of Maryland, located the line known as "Michler Line," and reproduced in this cause by the plaintiff and marked upon the plat, "Fairfax Meridian," no survey had ever been made to determine the western boundary of Maryland. This line was located in pursuance of the Act of 1852 of the General Assembly of Maryland and the Act of 1858 of the General Assembly of Virginia, but the commissioners and Lieut. Michler were limited to the "Fairfax Stone" as the initial point of their survey, under the terms and provisions of the said Acts of Assembly and were not permitted to ascertain, by actual survey upon the ground, the first fountain of the Potomac River. Maryland took this stand at the time upon the express condition that Virginia would accept and ratify it, which, as will be seen hereafter, Virginia refused and failed to do.

The State of Maryland in order to obtain a final settlement of the controversy which had existed for more than one hundred years, by the Act of 1852 consented to start the survey at the "Fairfax Stone,' upon the express condition, as set forth in the Act, that the State of Virginia should also pass an Act providing for the appointment of a commissioner to act in conjunction with a commissioner on the part of Maryland in the premises, and that upon the ratification of the report of such commissioners by the State of Virginia and the State of Maryland, through their respective Legislatures, the said boundary lines should be fixed and established so to remain forever, unless changed by mutual consent of the said States.

The Virginia Act of 1858 contained provisions similar to those of the Maryland Act of 1852, providing for the ratifica-

tion of the report of the commissioners by the Legislatures of both States and that upon such ratification and adoption, the line, as fixed by them beginning at the "Fairfax Stone" should be determined forever as the boundary between the said States.

It will thus be seen that the commissioners were precluded from ascertaining, by actual survey, the most western source or first fountain of the North branch of the Potomac River, and were bound down to the "Fairfax Stone" as the initial point of their survey and the line to be fixed by them as the western boundary of Maryland.

Starting from the "Fairfax Stone" and running north, at the end of 4020 feet, the main stream of the Potomac River was crossed, where that river is 30 feet in width between banks and at a point 3842.4 feet east of the forks.

This line as located by Lieut. Michler, was adopted and ratified by the General Assembly of Maryland at its session of 1860, upon the assumption that it would be likewise adopted and ratified by the General Assembly of Virginia, which was never done. Moreover West Virginia, as well as Maryland, denies in this case that the Michler line of 1859 is the boundary between the two States and West Virginia contends that her territory extends to a series of lines considerably beyond, that is to say, to the east of the Michler line. So that the Act of conditional ratification on the part of Maryland did not become effective and did not bind the State of Maryland to the "Fairfax Stone" as the initial point from which her western boundary was to be run, and the question was and is left open for determination, and that question as it originally stood is presented to this Court for its finding and decree in the case at bar.

The country in which the North branch of the Potomac River takes its rise was in 1897 at the time the surveys were

made in this case, almost a perfect wilderness, and it was a matter of not infrequent occurrence for those engaged upon the work, to see evidence of the presence of deer, bear and other animals which have their home in a region of virgin forest, wild, unbroken and uninhabited.

First Fountain of Potomac River Located at Potomac Spring.

In order to determine which was the most western source or first fountain of the Potomac River, the Surveyor on the part of the plaintiff in this case, was instructed to locate by actual survey upon the ground, the different streams, their sources and springs, which together make up the head waters of the North branch of the Potomac River, and having ascertained by such survey, the most western source or first fountain, to plant at said point a stone which was to be taken as the base and beginning of the meridian to be located as the western boundary of the State of Maryland.

Having determined by actual survey, that the meridian running north from the "Fairfax Stone" crossed the main body of the river at a distance of four thousand and twenty feet north, a station was fixed on the farther or south bank of the river at low water mark, which is designated "Station Zero" upon the plat, and from thence, by actual survey, according to the courses and distances contained in the return of the Surveyor on the part of Maryland, the main body of the stream was located up to the point where it forks and designated upon the plat, "Station 31," and thence, by actual survey, the stream marked "Fairfax Run," upon the plat was located and found to be 6418.8 feet in length from "Station 31." The stream marked "Potomac River" upon the plat, was located by actual survey to its source at "Potomac Spring" and was found to be 6477.7 feet in length, from "Station 31."

The three springs in the immediate vicinity of "Fairfax Stone" are simply wet weather springs and frequently go dry, while the spring marked "Potomac Spring" upon the plat, is perennial in its flow and a constant volume of water issues therefrom.

The two streams were measured from "Station 31" for a distance of three hundred feet up each stream, and the width of each stream for that distance was carefully measured, the result of which was, that the number of feet of running water in Potomac River flowing from "Potomac Spring" was 266 feet, while the number of feet of running water in "Fairfax Run" was 238 feet, and the average width of Potomac River for said distance of three hundred feet above "Station 31" was 9.14 feet, while the average width of "Fairfax Run" for the same distance was 8.2 feet.

"Fairfax Run" takes its rise upon "Fairfax Hill," which is a foothill of the Great Savage or Backbone Mountain.

"Potomac River" heads within 277.3 feet of the summit of the Great Savage or Backbone Mountain, and at an elevation of 124.7 feet greater than "Fairfax Stone."

This difference in elevation was obtained by running an actual line of levels, beginning at "Fairfax Summit" on the line of the West Virginia Central and Pittsburg Railway. The elevation of "Fairfax Summit" is 3066 feet, and the elevation, as found by running a line of levels from the "Fairfax Summit" to the "Fairfax Stone," was found to be at the latter point, 3162.0416 feet, and by continuing said line of levels to "Potomac Spring," it was found that the elevation of the latter point was 3287.0120 feet, or an actual difference in elevation in favor of "Potomac Spring," of 124.0704 feet. (*Vide*, Record, pages 926, 927, 928 and 929.)

From "Station Zero" to "Station 31" upon the plat, it will be noticed that the river pursues its general and prevailing course, but from "Station 31" to the "Fairfax Stone" the

"Fairfax Run" leaves the general course of the river and makes a great bow around to the "Fairfax Stone" from "Station 31," whilst Potomac River, as designated upon the plat from "Station 31" to its first fountain at "Potomac Spring," pursues the general and prevailing course of the river.

Potomac River, west of "Station 31" upon the plat, takes its rise in the Atlantic Watershed, and at "Potomac Spring," upon and near the summit of the Great Savage or Backbone Mountain, which is the "divide" separating the waters flowing into the Atlantic Ocean from those flowing into the Ohio and thence into the Mississippi.

"Potomac Spring," as shown upon the plat, is the most westerly source of the Potomac River, and this fact was ascertained by actual survey of all the streams at the head of the North branch of the Potomac, according to the returns of the Surveyor on the part of the State of Maryland.

The waters of Potomac River west of "Station Zero" upon the plat, were located by actual survey in this cause by the State of Maryland only, and their location as made by the plaintiff, was adopted by the State of West Virginia, the defendant. The stream marked "Lead Mine Run" upon the plat is a tributary of Cheat River, as well as the stream, "Glade Run" and take their rise in the Atlantic Watershed and none of the streams shown upon the plat head elsewhere than upon the Backbone Mountain except "Fairfax Run" and the "South Prong" of the Potomac River, neither of which, as will be seen, follow the general course and trend of the river.

The stream marked, "Laurel Run" upon the plat, is the chief tributary of the Potomac River upon its upper waters, and takes its rise at the point marked, "Laurel Run" upon the plat, and upon the Backbone Mountain and west of the "Fairfax Meridian" running north from "Fairfax Stone."

In addition to the main stream of " Laurel Run" heading west of the "Fairfax Meridian," at least one branch or fork of the stream also rises west of the "Fairfax Meridian" as shown upon the plat.

It will thus be seen, that a meridian drawn north from "Fairfax Stone," crosses not only tributaries of the Potomac River, but also the main body of the river, and at a point where the stream is thirty feet in width between banks.

It is not disputed that the Fairfax and Potomac meridians are correctly run and located upon the ground, and upon the plat of the State of Maryland.

The Michler or Fairfax meridian has been reproduced, simply for the purpose of illustration and of showing that the call in the Charter to Lord Baltimore cannot be gratified by running a meridian from "Fairfax Stone" to the "Mason and Dixon Line."

The only line that has been laid down by either party to this cause during the progress of the surveys, is "Potomac Meridian" with its initial point at "Potomac Spring," and running to the "Mason and Dixon Line," and located upon the ground by the State of Maryland as and for her western boundary and in conformity with the call in the Charter to Lord Baltimore.

The State of West Virginia has not undertaken to locate any line as a boundary between the two States, and the Court is therefore, limited to the consideration [redacted] of the "Potomac Meridian" as the only line which has been laid down, by actual survey, upon the grounnd, by either party to this controversy, as a boundary line between the States of Maryland and West Virginia.

Monroe Line.

The "Monroe Line" shown upon the plat of the plaintiff, was located by the State of West Virginia under instructions

from counsel for the defendant, and according to the report of the Surveyor for the defendant, (page 1382 of the Record), he was instructed to locate and retrace upon the ground, as far as possible, both the line run by Lieut. Michler in 1859, and also an alleged line between Maryland and West Virginia sometimes spoken of as the "Deakins Line."

This "Monroe" line was run with an ordinary compass, with a constant allowance of 3° and 40′ to the right for magnetic variation. It was assumed by the defendant in making this location that Deakins had run a line from the "Fairfax Stone" to the "Mason and Dixon Line" about the year 1789.

The Michler or Fairfax meridian is an astronomically true North line, but the "Monroe Line," as shown upon the plat, while it has a common starting point at "Fairfax Stone," with the Fairfax or Michler meridian, almost immediately leaves said meridian and bears off to the right.

Divergence of Monroe Line From True North.

By actual survey, it was ascertained that, at the end of six thousand feet on the "Fairfax Meridian," the "Monroe Line" was 83.1 feet to the east; at the summit of Backbone Mountain, at the end of 15092.6 feet on said meridian, the "Monroe Line" was 207.8 feet to the east; at Snaggy Mountain, 105,600 feet, on said meridian, the "Monroe Line" was 1204.7 feet to the east and at the "Mason and Dixon Line" 190,438 feet, on said meridian the "Monroe Line" was 1461.1 feet to the east.

The "Monroe Line," therefore, did not retrace the Fairfax meridian and is not therefore, a true North line and does not gratify the call in the Charter to Lord Baltimore as a boundary between the States.

It is assumed that the State of West Virginia merely intends, at the argument and during the further progress of this case, to use the said "Monroe Line" as a reference line

from which to locate and refer to property lines appearing upon her plats in this cause.

Alleged Deakins Line Not Located.

The alleged "Deakins Line" referred to in the answer of the State of West Virginia, and contended for by it as a true boundary between the States of Maryland and West Virginia, has not been reproduced or located by the State of West Virginia in this cause, and does not appear upon the plats of either the plaintiff or the defendant. It is respectfully submitted and will be shown hereafter that such a boundary is incapable of location as a continuous line.

Sections of the western lines of the most western tier of Military Lots laid out by Deakins in 1788, were located by both plaintiff and defendant, as appears upon their respective plats, and while an effort was made by the defendant to locate the alleged "Deakins Line" it was admitted by her surveyor that in this she failed. If the alleged "Deakins Line" was located by Colonel Francis Deakins at the time of laying out the Military Lots in the State of Maryland in 1788, as maintained by the defendant and denied by plaintiff, it was a mere gratuitous and arbitrary location and made without authority. The line which appears upon the plat of Francis Deakins returned to the Land Office of Maryland, and a copy of which plat is exhibited by the defendant at page 362 of the Record, was a line not located by said Deakins at all, but according to the notation upon said plat was a meridian fixed by Lord Fairfax.

The attention of the Court is respectfully directed to the statement upon the Deakins plat which refers to said line, and is in the words following:

> "The Meridian Line and the head of the North branch of Potomac River *as fixed by Lord Fairfax.*"

It will further appear that the location of the Fairfax Stone is not shown upon said plat.

Deakins states upon said plat that said line was fixed by Lord Fairfax. In laying out the Military Lots he did not go beyond the line that Fairfax had fixed, and in so doing evidenced a desire to avoid future litigation of the title of the lots which were awarded as compensation to the soldiers of Maryland and which were located along said line.

These Military Lots were laid out in pursuance of the terms and provisions of a resolution of the General Assembly of Maryland, passed at April Session, 1787, and was as follows:

> "Resolved, that the Governor and Council be requested to appoint and employ some skilful person to lay out the manor, and such parts of the reserves and back lands, belonging to this State, lying to the westward of Fort Cumberland, *as he may think fit and capable of being settled and improved,* in lots of 50 acres, each bounded by a fixed beginning and 4 lines only, unless on the side adjoining Elder surveys; that the beginning of each lot be marked with marking irons, or otherwise, with the number thereof, and that a fair book of such surveys describing the beginning of each lot by its situations, as well as number, be returned and laid before the next General Assembly; that a brief note of the improvements which may happen to be on any lot, and the name of the person, if any, settled thereon, be inserted at the foot of the Certificate of Survey thereon, and that the reasonable expenses of such surveys be paid by this State.
>
> "Resolved, that the Governor and Council be requested to cause the Auditor-General, or other proper officer, to make out an accurate and fair list of the officers and soldiers who are entitled to bounties of land

under the promises of this State, and to lay the same before the next General Assembly." (*Vide,* Record, page 73.)

Francis Deakins was employed by the Governor and Council of Maryland, in accordance with the above resolution, to lay out the Military Lots to the westward of Fort Cumberland, and his report of survey was adopted by Chapter 44 of the Acts of the General Assembly of Maryland, passed at November Session, 1788, but nowhere, either in the resolution or in the Act of 1788, Chapter 44, adopting said report of survey, was any authority conferred, expressly or by implication on the said Deakins to locate any line as a boundary of the State of Maryland; on the contrary, it is plainly apparent from the text of this resolution that in point of fact it not only did not contemplate that the western lines of the lots to be surveyed by Deakins were to form a boundary line, but on the contrary that the western lines of these lots to be surveyed were not to constitute a boundary line, and were positively not at the extremity and boundary of the State. This, it is respectfully submitted, is so unmistakably plain and clear that an inspection of this resolution leaves not the slightest doubt on the subject.

Deakins Line Repudiated as Boundary.

Moreover, after Deakins had completed his survey, the General Assembly reasserted precisely what it had in effect declared in the resolution directing the surveys, viz: that the western lines of the lots were not intended to be the western boundary of the State. The Legislature by section 15 of said Chapter 44 of the Acts of 1788, expressly repudiated the so-called "Deakins Line" as a boundary, which section is in the words following, to wit:

"And be it enacted that the line to which the said Francis Deakins has laid out the said lots, is, in the

opinion of the General Assembly, far within that which this State may rightly claim as its western boundaries; and that, at a time of more leisure, the consideration of the Legislature ought to be drawn to the western boundaries of this State as objects of every great importance." (*Vide,* Record, page 877.)

In addition to this direct, express and repeated repudiation of the so-called "Deakins Line" by the General Assembly, as a boundary line, the surveys in this case on behalf of the State of Maryland prove beyond controversy that the same is not, in any sense, a boundary line. Furthermore the surveys of the defendant prove with the same undeniable certainty that the "Deakins Line" is not and cannot be considered the western boundary line of Maryland.

It is not a *meridian*—a due North and South line; it is not a continuous line, but is broken by numerous grants, made by the Proprietary of Maryland in 1774, 14 years before the laying out of the Military Lots, and is likewise broken by the irregular location of the western boundaries of the lots themselves, and aside from the reference to said line in section 15, Chapter 44, in the Acts of 1788, there is no evidence that any such line was ever run by Deakins.

It is true that the plat returned by him, and now on file in the Land Office of Maryland, a copy of which is exhibited in this cause, does show that the western lines of the most western tier of lots as located by him, are laid out to a broken line which, upon the said plat, appears to be a North and South line, yet, when the lots are located on the ground, by actual survey, it is found that their western lines are not in the same North and South line as appears from the surveys on the part of the plaintiff in this cause, and as repeatedly admitted by the defendant in her testimony. So that this alleged line is not only not a line at all, but in no sense can it

be considered or regarded as a meridian as expressly called for by the Charter.

The "Deakins Line" was not run from the "Fairfax Stone." The copy of his plat filed in this cause by the defendant as exhibited, and found at page 362 in the Record and marked "Exhibit H," fails to show the location of the "Fairfax Stone" thereon, and does not show that the said "Deakins Line" runs from the "Fairfax Stone."

There is nothing in the Record in this case to show the position of said line upon the ground, the State of West Virginia having failed to locate said line and the same cannot be considered as a factor in the solution of the questions at bar.

It is shown upon the plat of the plaintiff, that the western line of the western tier of Military Lots which were located by actual survey in this cause by the plaintiff, does not run in one and the same North and South line.

The location of the Military Lots appearing upon the plat and as made by the State of Maryland, is practically conceded by the defendant to be correct, and in point of fact, is a true and correct location of said Military Lots, they having been run out upon the ground according to the courses, distances and calls contained in the original Certificates of Award therefor.

The State of West Virginia has failed to locate the "Deakins Line" as a boundary, although full and ample opportunity was afforded her during the progress of the surveys of the case to locate the said "Deakins Line," but she has utterly failed to substantiate her contention that the said "Deakins Line" is a boundary line between the States.

The only reference to the "Fairfax Stone" in all the work of Francis Deakins relative to the laying out of the Military Lots, is that contained in the Certificate of Survey of Lot Number 1101, which reads as follows:

"Beginning at a bounded maple, marked 1100, standing 1 mile North from a stone fixed by Lord Fairfax as the head of the North branch of the Potomac, and running north 89½ perches, east 89½ perches, south 89½ perches then by a straight line to the beginning, containing 50 acres."

Deakins does not say that he fixed the beginning of Lot No. 1101 by running the intervening distance between "Fairfax Stone" and the beginning of said lot as fixed by him, but simply states that said beginning stands "1 mile North from" a stone fixed by Lord Fairfax as the head of the North branch of the Potomac River. (See Record, page 367.)

It is also alleged in the answer of the State of West Virginia, that the western tier of lots called for the "Deakins Line" as a North and South line, but the Court will, on examination of the Certificates of Survey of said lots as filed in the Record at page 366, see, that no reference, whatever, is made to the "Deakins Line" in the description of any of said lots.

An inspection of the plat of both parties will show that the western line of said Military Lots is not a line common to all said lots, and that they were not laid out from the same base line.

Had said lots all been laid out to a straight line running from the "Fairfax Stone" to the "Mason and Dixon Line," their western boundary would coincide with the Fairfax meridian, which, as already stated and as will be more particularly shown hereafter, it does not.

There is no call in any of the patents granted by the State of Virginia for the "Deakins Line" as a boundary between the States, although there is a call in several of said patents for the Maryland line. At the time the majority of said patents were issued no line had been located between the two

States and no survey had been made to fix and delimit the western boundary of the State of Maryland.

Potomac Meridian Run.

Pursuant to the instructions given to the Surveyor on the part of the State of Maryland, to ascertain and fix by actual survey the first fountain of the Potomac River and to run from thence a meridian line north to the "Mason and Dixon Line," the first fountain having been located and which is designated upon the plat, "Potomac Spring," the services of Dr. L. A. Bauer, Chief of the Division of Terrestrial Magnetism of the Coast and Geodetic Survey of the U. S. Government, were secured, and as will be seen from his report in the Record, beginning at page 649, he determined the said meridian as the western boundary of the State of Maryland conforming to the call in the Charter to Lord Baltimore and designated upon the plat, "Potomac Meridian."

The principal station for this line was selected on top of the Backbone Mountain, 495.9 feet North of the Potomac Stone at "Potomac Spring," and the same methods were employed for determining and prolonging this meridian as were used in the case of the Fairfax meridian and detailed in the report of Dr. Bauer.

This line is a true North and South line and fulfills in every particular the call in the Charter of Maryland and was located by the State of Maryland in this cause as delimiting and fixing her western boundary.

This is the only line located by either party in this cause as a boundary line between the States of Maryland and West Virginia and the Court, it is respectfully submitted, is therefore, limited to the consideration of this line in the determination of this cause.

Location of Land Tracts.

In the year 1774, the Governor and Council of Maryland took off the reserve which had been made as to the lands lying in the western part of the Province, and opened the Land Office from which warrants were issued to such persons as applied, and surveys were made under said warrants and certificates thereof returned to the Land Office, and in the progress of the surveys in this cause on behalf of the plaintiff, certain of these original grants from the Proprietary of Maryland were located and are shown upon the plat.

The most southerly of these locations is the tract called the "Royal Charlotte" shown upon the plat.

It will be noticed that this tract runs west of the Fairfax meridian, starting from "Fairfax Stone."

The tract called "Royal Charlotte" begins at black A on the plat and runs thence according to its courses, distances and calls, as shown thereon.

The tract called "The Promised Land," was located for the purpose of finding, by actual survey upon the ground, the beginning of the tract of land called, "Kindness," shown at black C on the plat.

The tract called "Kindness" calls to begin at the end of the third line of the "Promised Land," and extends west of the Fairfax meridian.

The tract called "Thomas and Ann," was located from a planted stone, marked R. O. and pointed ont to the surveyor by witnesses produced upon the ground, as standing at the original beginning of said tract shown at black D on the plat, and this tract extends west of the Fairfax meridian.

The tract called "The Diadem," was located from a planted stone, pointed out to the surveyor as standing at the original beginning of said tract shown at black E on the plat and extends west not only of the Fairfax meridian, but also west of the Potomac meridian.

The tract called "Elder Spring," was located by the surveyor from an anciently bounded black gum tree and a white

oak stump, pointed out to him by witnesses produced upon the ground, as the original beginning of the said tract of land and extends west of the Fairfax meridian.

The tract called "Ashby's Cove," was patented by the State of Maryland, and was located according to the courses, distances and calls contained in the original Certificate of Survey and patent therefor, and begins at black W on the plat, and lies west of the Fairfax Meridian.

The tract called "Non Pareil," was patented by the State of Maryland and its location will be hereinafter referred to.

These tracts of land were located by the plaintiff for the purpose of showing that, at the time of their respective grants, the Propriety of Maryland did not recognize a meridian or line running North from the "Fairfax Stone" as the western boundary of his Province.

For the purpose of showing that the State of Virginia also did not recognize that a line had been fixed and determined between the States of Maryland and Virginia, certain tracts granted by the State of Virginia have also been located, namely, Ashby 300 acres, Hooker and Deakins 138 acres. The plaintiff has also located, by actual survey, certain of the lines of the tracts of land called, "Siege of Acre Resurveyed," "Troas Resurveyed" and "White Rock," which call for the Michler or Fairfax meridian.

The plaintiff has also located, by actual survey, certain lines of the tract of land called "Thomas and Ann," extending west of the Fairfax meridian, and some of the lines of the Deakins six thousand acre tract, granted by the State of Virginia, from which the beginning of the Maryland grant, "Non Pareil" was fixed.

Possession of Disputed Territory.

Any claim upon the part of West Virginia that the so-called "Deakins Line" marks the western boundary of the

State of Maryland is entirely overthrown by the facts of this case which show beyond all doubt that persons holding patents from the State of Maryland are today in absolute, undisturbed possession of land far beyond any line which could by any possibility be set up as the so-called "Deakins Line."

The plat filed upon behalf of West Virginia establishes this beyond all question, for tracts are shown upon that plat which extend westward far beyond the western tier of Military Lots, which tracts it is admitted are held under Maryland titles and over which it is not pretended by West Virginia that any grants by that State of the State of Virginia, or by the State of Virginia were ever made.

Determination of Southern Boundary.

The southern boundary of Maryland was fixed and determined by the award of Hon. Jeremiah S. Black, and Hon. Charles J. Jenkins, to whom, in conjunction with Hon. James B. Beck, the matter had been submitted for arbitration and award, under appropriate legislation of the States of Maryland and Virginia.

These arbitrators fixed said southern boundary at and upon the southern shore of the Potomac River, and by concurrent legislation of Maryland and Virginia in 1878, the line so fixed was declared to be the true boundary between said States, and the Congress of the United States, by Chapter 196 of its Acts of 1878, confirmed such legislation and ratified said boundary as established and determined by said arbitrators.

The State of West Virginia was not a party to this arbitration and award, but the Court will take judicial notice of the same, and will see that the contention of Maryland for the southern shore of the Potomac as her southern boundary was upheld and sustained thereunder, and the call in her charter thereby admitted, gratified and determined.

ARGUMENT.

Jurisdiction of This Court.

The Supreme Court of the United States has original jurisdiction under the Constitution of controversies between the States of the Union concerning their boundaries, although the judgment of the Court may affect the territorial limits of the States that are parties to the suit.

Florida vs. Georgia, 17 Howard, 478.
Virginia vs. West Virginia, 11 Wallace, 39.
U. S. vs. Texas, 143 U. S. 671; 162 U. S. 1.
Louisiana vs. Mississippi, 202 U. S. 1.

The only tribunals under the Constitution that can act on boundaries of States are the legislative and judicial branches of the Government. The legislative branch is limited to assent or dissent when a compact is referred to it by the State, and the judicial branch of the Government can exercise its power when a State is a party to the controversy.

Rhode Island vs. Massachusetts, 12 Peters, 657.

The Charter of Maryland gave to the Lord Proprietary an absolute right of soil in and to all the territory comprehended within its specified boundaries.

Cunningham vs. Browning, 1 Bland Ch. Rep., page 305.
Cassell vs. Carroll, 11 Wheaton, 134, 170.
Binney's Case, 2 Bland, Ch. 127.
Baltimore vs. McKim, 3 Bland Ch. R. 455-6
Briscoe vs. State, 68 Md. 294, 296
Wharton vs. Wise, 153 U. S. 155.
Morris vs. U. S., 174 U. S. 196.

The State of Maryland at and by the Revolution acquired all the territorial rights vested in the Proprietary before the Revolution.

Ringgold vs. Malott, 1 H. & J. 299.
Howard vs. Moale, 2 H. & J. 249.
Cunningham vs. Browning, 1 Bland Ch. R. 307.
Baltimore vs. McKim, 3 Bl. Ch. 460.
Binney's Case, 2 Bland Ch. R. 127.
Matthews vs. Ward, 10 G. & J. 443
Smith vs. Devecmon, 30 Md. 473.
Biscoe vs. State, 68 Md. 294.
Wharton vs. Wise, 153 U. S. 155.
Morris vs. U. S., 174 U. S. 196.

For the unusually favorable, extensive and sovereign character of the Grants in the Charter of Lord Baltimore, see the discussions by Bancroft, Story, McMahon and Chalmert, in "Appendix D" of this Brief, and also in United States vs. Morris, 23 Washington Law Reporter, 759, etied herein in full, *infra.*

In the case at bar no compact exists or ever did exist between the State of Maryland and the State of Virginnia or West Virginia concerning the western boundary of the State of Maryland.

The General Assembly of Maryland, by resolution passed on the 6th day of October, 1777, appointed Daniel of St. Thomas Jenifer, Thomas Stone and Samuel Chase commissioners for the purpose of adjusting, with George Mason and Alexander Henderson, commissioners on the part of Virginia, "the navigation and jurisdiction over that part of the Chesapeake Bay which lies within the limits of Virginia, and over the rivers Potomac and Pocomoke," subject to the ratification of the General Assembly.

These Commissioners met in conference at Mount Vernon, and the result of their labors was the Compact of 1785, which

received the ratification and approval of the Legislatures of bothes States the following year.

This Compact dealt only with the *southern* boundary of Maryland, and was confined in its scope to the consideration of questions of navigation and jurisdiction over that part of the Potomac River which was navigable, and had nothing directly to do with the western boundary of the State of Maryland. This Compact is today a binding and subsisting obligation upon the States of Maryland and Virginia, having been, in effect, ratified by Congress and acknowledged by this Court. Under it and the arbitration based upon it, the southern shore of the Potomac River is established as the southern boundary of Maryland.

United States vs. Morris, 174 U. S.
United States vs. Morris, 23 Washington Law Rep. 745.
Wharton vs. Wise, 153 U. S. 155.
Acts 45th Congress, 3rd Sess., Ch. 196, U. S. Stat. at Large, Vol. 20, pp. 481-2; see Appendix B of this brief.

By this arbitration and award the southern boundary of Maryland was established on the *southern* bank or shore of the Potomac River, giving to the State of Maryland exclusive jurisdiction and government over *said river,* thereby *confirming the call in the Charter to Lord Baltimore for the farther or southern bank of said stream.*

Morris vs. U. S., 174 U. S. 196, affirming U. S. vs. Morris, 23 Washington Law Rep. 549.

THE STATE OF MARYLAND STANDS UPON THE CALLS IN THE CHARTER TO LORD BALTIMORE AS PARAMOUNT, CONTROLLING AND FINAL IN DELIMITING AND FIXING HER

WESTERN AND SOUTHERN BOUNDARIES, WHICH CALLS ARE AS FOLLOWS, TO WIT:

"Transeundo a dicto æstuario vocato Delaware Bay recta linea per gradum prædictum usque ad verum Meridianum primi Fontis Fluminis de Pottomack deinde vergendo versus Meridiem ad ulteriorem dicti Fluminis Ripam et eam sequendo qua Plaga occidentalis ad Meridionalis spectat usque ad Locum quendam appelatum Cinquack prope ejusdem Fluminis Ostium scituatum ubi in præfatum Sinum de Chessopeake evolvitur ac inde per Lineam brevissimam usque ad prædictum Promontorium sive Locum vocatum Watkin's Point."

Going from the said estuary called Delaware Bay in a right line in the degree aforesaid to the true meridian of the first fountain of the River Potomac, then tending downward towards the south to the farther bank of the said river and following it to where it faces the western and southern coasts as far as to a certain place called Cinquack situate near the mouth of the same river where it discharges itself in the aforenamed Bay of Chesapeake and thence by the shortest line as far as the aforesaid promontory or place called Watkin's Point.

THE CONSTRUCTION OF THIS GRANT OF TERRITORY IN THE CHARTER OF MARYLAND HAS BEEN JUDICIALLY SETTLED. THE COURTS AND ALL OTHER AUTHORITIES HAVE AGAIN AND AGAIN DECLARED THAT THE CHARTER DEFINES THE WESTERN AND SOUTHERN BOUNDARIES OF THE FORMER PROVINCE AND PRESENT STATE OF MARYLAND AS HAVING A COMMON TERMINUS AT THE FIRST FOUNTAIN OF THE POTOMAC RIVER—THAT IS TO SAY, THAT THE WESTERN BOUNDARY IS THE MERIDIAN RUN-

NING FROM THE PENNSYLVANIA LINE DUE SOUTH TO THE FIRST FOUNTAIN OF THE POTOMAC RIVER, AND THAT THE SOUTHWESTERN AND SOUTHERN BOUNDARY BEGINS AT THE SAID FIRST FOUNTAIN ON THE FARTHER OR SOUTHERN BANK OR SHORE, AND FROM THAT POINT RUNS ALONG SAID FARTHER OR SOUTHERN SHORE OR BANK OF THE RIVER TO ITS MOUTH—THE SOUTHERN SHORE OR BANK OF THE RIVER, FROM ITS SOURCE TO ITS MOUTH, BEING THE BOUNDARY OF MARYLAND ON ITS SOUTHERN AND SOUTHWESTERN SIDES, AND THE WHOLE OF THE RIVER AND ITS BED, FROM ITS SOURCE TO ITS MOUTH, BEING WITHIN THE BOUNDARIES OF THE STATE.

EVERY COURT, EVERY JURIST AND EVERY AUTHOR WHO HAS EVER MENTIONED THE SUBJCET AT ALL, UNITE, CONCUR AND AGREE IN THIS CONSTRUCTION AND VIEW OF THE BOUNDARIES CALLED FOR BY THE CHARTER, AND NOT A SINGLE DISSENT FROM THIS CONSTRUCTION CAN BE FOUND ANYWHERE EXCEPT THE CLAIM PUT FORTH FOR THE FIRST TIME IN THIS CASE THAT THE WESTERN BOUNDARY OF MARYLAND DOES NOT RUN TO THE WESTERN SOURCE OR FIRST FOUNTAIN OF THE POTOMAC, BUT IS LOCATED ON THE MAIN BODY OF THE STREAM, TWO MILES (10,321.1 feet) EASTWARD FROM ITS MOST WESTERN SPRING OR SOURCE, AND ALMOST A MILE (4,020 feet) DISTANT FROM THE SPRING WHICH THE DEFENDANT CONTENDS IS THE FIRST SPRING CALLED FOR BY THE CHARTER.

The construction of the Charter unanimously and repeatedly declared by the authorities as above stated, and which upon its face is plainly its true construction, absolutely negatives and controverts the contention of the defendant State in this case. That contention is that the Fairfax Stone marks

the spring which is to be taken as the "first fountain of the Potomac" and that the western boundary of Maryland is located by the meridian running north from the Fairfax Spring, which, as appears in the Record and upon the maps and plats in the case, crosses the main stream of the Potomac River where it is fully thirty feet wide, two miles east of its most western source or spring head, and nearly a mile away from the spring which is alleged by the Defendant to be the first fountain and which is within the territory of West Virginia, and that this meridian starting from said spring runs nearly a mile northward before the western or southern line of Maryland, as laid down by the defendant, is reached.

The Court will at once perceive that the question here presented has nothing whatever to do with and is wholly apart from the old dispute as to whether the "first fountain," intended by the Charter, was the source of the southern branch or of the northern branch of the Potomac. That was an entirely different question; and with that question we are not concerned in this case.

This case as presented to the Court is confined altogether to the North Branch of the River, and the question is which and where is the first fountain of that stream, namely the North branch, taken, as it is taken in this case, as the main stream of the river. We repeat, there never was any question that, according to the calls of the Charter, the "first fountain" of the river, wherever it might be, was the common terminus of the western and southern boundaries of the Province or the State and was itself a point within the boundary and territory of Maryland.

In more than a century and a half of discussion of the location of the western and southern boundary of the domain granted to Lord Baltimore, there never was any doubt on that point. Whether the western meridian vas to be located at the source of the northern or at the source of the southern branch, it was agreed that the whole river, whichever branch

was the true main stream, from its mouth to its source, was the boundary between the two States, that this boundary along the river ran to its first fountain and then from that fountain northward along the meridian to the Pennsylvania line, so that the first fountain called for by the Charter was a common terminus for the western and southern or southwestern boundary of the State. So that we respectfully beg to say again that the original and novel construction of the Maryland Charter set up by the defendant herein to the effect that the "first fountain" called for in the Charter is not in the boundary of Maryland at all, that *only a part* and *not all* of the Potomac River forms the boundary of Maryland, that only a part and not all of the river is within and a part of the State, that the meridian at the western boundary is two miles *east* of the most western fountain of the river and that the State at the west terminates *there,* that the southern or southwestern boundary is a mile north of the alleged "first fountain" and that the State at the south terminates *there;* and that West Virginia, according to the Charter, had dominion and property of the soil and of the river two miles west of the western boundary of the State and also dominion and property of the soil a mile north of the alleged "first fountain," is not only at war with the unmistakable meaning of the territorial grant to Calvert, but also with the one, uniform and unvarying interpretation of the grant under consideration, which this Court and every other Court, as well as every publicist and historian who has discussed the subject, has declared to be the true interpretation.

The State of Maryland then respectfully submits at the outset to this Honorable Court that it has always been understood and declared, never denied or doubted and repeatedly and uniformly adjudicated that the southern and southwestern boundaries of Maryland extend along the southern shore of the Potomac River *from its mouth throughout its whole extent to its first fountain or source.* In other words, the merid-

ian which the Charter calls for as its western boundary, and which is located at the first fountain of the river, runs from Pennsylvania line to the first fountain of the river and that, accordingly, the southwestern and the southern boundaries of the State extend from the point of the meridian at its first fountain upon the southern bank of the stream at its first fountain all the way to the mouth of the stream at the Chesapeake Bay. Every Court and every other authority which has had occasion to consider this subject has so construed this Charter. And this is the only construction which is consonant with the manifest intention of the grant and with the rule of interpreting such grants as laid down by the foremost publicists and jurists.

U. S. vs. Morris, 174 U. S., page 196; 223.
U. S. vs. Morris, 23 Wash. Law Rep. 745.
Binney's Case, 2 Bland, 127.
Biscoe vs. State, 68 Md. 294, 296.
Chapman vs. Hoskins, 2 Md. Chanc. 485.
Alexandria Canal, R. R. and Bridge Co. vs. District of Columbia, 9 Wash. Law Rep. 456.
1 Story, Commentaries on the Constitution, sec. 103.
O'Neal vs. Va. Bridge Co. 18 Md. 1.
Handley's Lessee vs. Antony, 5 Wheaton, 374.
Doddridge vs. Thompson, 9 Wheaton, 469.
Reynolds vs. M'Arthur, 2 Peters, 417.
Howard vs. Ingersoll, 13 How. 416, 424-5.
Vattell's Law of Nation, Bk. I, ch. 22, par. 5.
Bancroft's History of U. S., Vol. I, Ch. 7, pages 241-2-3.
McMahon's Hist. of Md., pages 49, 51, 69.
Mr. Alvey's argument in O'Neal vs. Bridge Co., 18 Md. 1, 16.
McSherry's Hist. of Md., pages 117-118.

Prof. Wm Hand Browne's "Maryland: The History of a Palatinate," page 18.

Scharf's Hist. of Md., Vol. I, pages 409-410.

Prof. Steiner's "Institutions and Civil Government of Maryland," page 2.

United States vs. Texas, 162 U. S. 1.

Dudden vs. Guardians of the Poor, 1 Hurlstone and Norman, 627.

Uhl vs. Reynolds, 23 Ky. Law Rep. 759.

30 American and English Ency. of Law, title "Waters and Watercourses," sub-title "Source," pages 351-352.

Gould on "Waters," section 41.

Wright vs. Brown, 1 Simon and Stuart, 203.

5 Cyc. "Boundaries," page 869.

2 Farnham on "Waters and Watercourses," section 501, page 1656.

In Morris vs. United States, 174 U. S. 196-223, this Court, with a full and elaborate discussion of "the history of the long dispute between Virginia and Maryland in respect to the boundary line" [illegible], declared that:

"The grant to Lord Baltimore in unmistakable terms included the Potomac River."

And also that:

"Upon *all the evidence*, the Charter granted to Lord Baltimore by Charles I in 1632, of the territory known as the Province of Maryland, *embraced the Potomac River and the soil under it, and the islands therein to high-water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper* (the Fairfax Grant)."

In announcing these conclusions the Supreme Court said:

"We agree with the conclusions of the Court below that upon all the evidence, etc."

The opinion of the "Court below" which the Supreme Court thus approved, was a most learned and careful discussion of the very subjects here presented, and we submit, having received the deliberate sanction of this Honorable Court, is entitled to the very greatest and utmost weight in the consideration of the same matters in the case now at bar.

We therefore present practically in full the minute and detailed opinion referred to, which was rendered by the Supreme Court of the District of Columbia in the case of United States vs. Morris, 23 Washington Law Reporter, 745.

The Supreme Court of the District of Columbia there said:

"It is proper to examine, in the first instance, the extent of the title of the State of Maryland to the lands and waters involved in this controversy.

"At the Revolution that State claimed every right therein that had been granted to Lord Baltimore by Charles I. The territorial extent of those rights in the River Potomac has been so firmly fixed by repeated adjudications that it would be needless to do more than recite the result of those decisions, except that they are involved in other questions arising in the cause; and it may therefore be better at this time to state the reasons upon which they are founded.

"The enormous grants to the London Company of the territory which stretched along the Atlantic seaboard from the 34th to the 45th degree of latitude, were annulled by the King's Bench in England under *quo warranto* proceedings in 1624, in the reign of James I. In 13 How. 398, Howard vs. Ingersoll, the consequences of such proceedings are thus stated: 'It may be well here to say, that the power of the King to alter, change, en-

large or diminish the limits of his *royal* grants in America cannot be denied. Those grants were of two kinds, royal and proprietary. In the former, the right of the soil and jurisdiction remained in the Crown; and their boundaries, though described in letters patent, were subject to alteration at its pleasure; for as it possessed the right of soil and government, and delegated them to his governors during pleasure, it might dispose of them in what manner and to whom it saw fit; might alter, extend or abridge them as its inclination or policy might declare.'

"From the time of this judgment, therefore, Virginia having become a royal government, the undoubted right revived in the Crown to alter or contract its former boundaries and carve out from them new and distinct governments at pleasure, to the same extent it had possessed the power to make the original grants to the London companies. 1 Story Const. page 22.

"And the XXI clause of the Baltimore Charter contains an assertion by the King, that the territory of Virginia, not otherwise granted, should be immediately subject to the Crown of England and dependent upon it forever.

"In the exercise of this undoubted right, the King proceeded to grant portions of the territory originally constituting Virginia to the proprietaries of Maryland, Pennsylvania, North and South Carolina. In view of the suggestion in one of the arguments before us, impeaching the regularity of the judgment on the *quo warranto,* and questioning the power of the King to effect this dismemberment of that great domain, it may be sufficient to recall that the General Assembly of Virginia twenty years afterwards in 1643, sent an earnest remonstrance to the King against the restoration of the Charters of the London Company; and that Sec. XXI

of the first constitution of that State (made in 1776 in accordance with the suggestion of Congress to all the Colonies), declared, that: 'The territories contained within the Charters erecting the Colonies of Maryland, Pennsylvania, North Carolina and South Carolina, are hereby ceded, released and forever confirmed to the people of those Colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever which might at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potowmak and Pocomoke, with the property of the Virginia shores or strands bordering on either of said rivers, and all improvements which have been or shall be made thereon.' 1 Henning's Stat., page 37. *This relinquishment of claim was repeated in the subsequent State Constitution; and reiterated carefully in that of 1870.*

"The Charter for the territory, thereafter to be known as the Province of Maryland, was granted June 20, 1632, to Cecilius Calvert, the second Lord Baltimore. It is evident the draftsman of that instrument had before him Captain John Smith's Map of Virginia of 1608, which was probably the only one then in existence at all reliable. Although the Charter undertook to describe the different boundaries by reference to such existing physical objects laid down on that map as were most likely to prove enduring, yet the ravages of time and of the elements have rendered some of them uncertain. *But the particular boundary with which we are now concerned, on the south and west, was fixed by more indestructible muniments.* The Charter described the northern boundary (substantially that which afterwards became known as Mason and Dixon's Line) as passing 'in a right line, by the degree aforesaid, unto the *true meridian of the first fountain of the River Pottomack;*

thence verging towards the South unto the further bank of the said River, and following the same, on the West and South, unto a certain place called Cinquack, situate near the mouth of the said river where it d'sembogues into the aforesaid Bay of Chesapeake; and thence by the shortest line unto the aforesaid promontory or place called Watkin's Point.'

"These words imperatively carry this meridian line to the further bank of the Potomac, thus fixing the *initial point of the southern and western boundary at high-water mark on that southern or 'further bank.'* The terminal point of that boundary line, designated as Cinquack (as laid down on John Smith's Map), was also on the same 'further bank;' and there being nothing in the description to suggest any deflection from the further bank between those points, *it necessarily follows that the entire southern and western line was to be upon that bank, and could be protracted in no other manner.*

"It has also been pointed out that the proper grammatical construction of the Latin words in the original Charter, *'deinde vergendo versus meridiem ad ulteriorem dicti fluminis ripam et eam sequendo,'* etc., demonstrates that the word *'eam,'* translated 'the same,' must refer to the feminine *'ripam,'* instead of the neuter *'flumen;'* which still further *shows that the entire southern and western boundary was to follow the further bank, at high-water mark,* instead of following the middle thread of the river. 6 Mackey, 226, Railroad and Bridge Co. vs. District of Columbia.

"The reiterated decisions of the Courts of Maryland and of every Court that has passed upon the question, have been uniformly to this effect. 2 Bland, 127, Binney's Case; 2 Md. Ch. Rep., Chapman vs. Hoskins; 18 Md. 1, O'Neal vs. Va. Bridge Co.

"*The Charter also expressly granted all the rivers within the limits described,* with all islands and islets therein. The understanding of the Baltimore Colonists from the beginning of the extent of their rights in the River Potomac appears in an interesting manner from the statement in 'The Relation of Maryland,' published in 1634, which, in describing their first settlement on St. Clement's Island in the Potomac, speaks of it as being 'within our own country.' And *from that day to the present there has never been a time when that State did not claim ownership and jurisdiction of the entire river and over every island in it from its headwaters to its mouth.* Analostan Island, within a bowshot of these flats and a stone's throw from the Virginia shore, was granted by patent from the Land Office in Maryland in 1668 The absolutely exhaustive examination presented by the distinguished counsel for Maryland to the Joint Commission of the two States in 1877 showed that the only three grants ever claimed to have been made by Virginia of islands in the Potomac are within the headlands of creeks, and therefore not in the river at all. The proper construction of such a boundary between conterminous territories was considered in 13 Howard, 381, Howard vs. Ingersoll. The State of Georgia relinquished part of its 'back lands' to the United States, 'west of a line beginning on the western bank of the Chattahoochee river, and running up the river and along the western bank thereof.' Congress formed the ceded territory into the State of Alabama, and a contest arose between rival grants of the two States to lands in the uncovered bed of the river adjoining the western bank. The Supreme Court held that when banks of a river are spoken of as lines of delineation between countries, those boundaries are meant which contain their waters at their highest flow, although the bank or bluff

may not be reached by the waters for two-thirds of the year; and that the words of that grant were operative to reserve to Georgia the entire bed of the river to the highest point along the western bank.

"The Joint Commission appointed by Maryland and Virginia to ascertain and fix the true boundaries between the States, in their report and award in 1877, confirm the Maryland claim that the intent of the Baltimore Charter was to place the *whole Potomac River within that grant, and that the Charter line was the right bank, where the high-water mark is impressed upon it.* But in view of the Compact of 1785, between the States, the Commissioners considered themselves justified in establishing thenceforth the low-water mark on the right shore as the boundary between the States instead of the high-water mark, as previously held, while confirming to Maryland its rights to the bed of the river and to the islands therein, and in all other respects. In 1878 this award was ratified by the Legislatures of the respective States, and consented to by Congress in 1879, with the proviso 'that nothing therein contained shall be construed to impair, or in any manner affect, any right of jurisdiction of the United States in and over the islands and waters which form the subject of the said agreement and award.' 20 Stat. 481.

"This award and legislation, although binding upon the States that had submitted their respective claims to the arbitration, could not affect the rights previously derived through the State of Maryland to the River Potomac and its subjacent land, within the boundaries of the District of Columbia, under the cession to the United States.

"The firm purpose of Charles I to confer upon Lord Baltimore proprietary rights altogether independent of

all previous grants to the London Companies in the territory called Virginia, and his determination to continue to hold as a Royal government the residue of the Virginia territory not granted to Maryland or to other colonies, is evinced by the language of sec. XXI of the Baltimore Charter, which assures unto the Proprietor, his heirs and assigns, and the freeholders and inhabitants in said Province present and to come, that the Province and its freeholders and inhabitants 'shall not henceforth be held or reputed a member or part of the land of Virginia * * * *from which we do separate both the said Province and inhabitants thereof.*'

"It is also worthy of notice that by the final clause of the Charter it was expressly declared: 'If peradventure hereafter it may happen that any doubts or questions should arise concerning the true sense and meaning of any word, clause or sentence contained' therein, 'we will charge and command that interpretation to be applied always and in all things, and in all our Courts and judicatories whatsoever, to obtain which shall be judged to be the more beneficial, profitable and favorable to the aforesaid, now Baron of Baltimore, his heirs and assigns.'

"Apart from the property in the lands, rivers, bays and their incidents, the Charter conferred upon the Lord Proprietor and his successors exceptional privileges and powers of government which render the grant to Maryland the most ample and sovereign in its character that ever emanated from the English Crown. The distant and exposed situation of the English Counties of Chester and Durham, on the Scottish border, had led to their establishment as Counties Palatine, and to the investment of the Palatinate governments therein 'with powers and prerogatives which fell little short of those of royalty itself.' 'They approached more nearly to sovereignty

than any other of the subordinate governments known to the laws of England. The powers originally incident to these in the border counties were soon found to be too extensive to be reposed with safety in the hands of the subject, and they were therefore much reduced and restrained at the period when this Charter was granted; but to the Proprietary of Maryland they were granted in all the extent to which they ever had existed.' McMahon's Maryland, 152-4. For, as expressed in Article 4 of the Charter, the Proprietor was clothed with 'all and singular and as ample rights, jurisdiction, privileges, prerogatives, royalties, liberties, immunities and royal rights and temporal franchises whatsoever, as well by sea as by land within the region, islands, islets and limits aforesaid to be had, exercised, used and enjoyed, as any Bishop of Durham, within the Bishoprick or County Palatine of Durham, in our Kingdom of England, ever heretofore hath had, held, used or enjoyed, or of right could or ought to have, hold, use or enjoy;' thus in explicit words granting the territory and government, with the very 'royal rights,' of which so much has been said, expressed in the Latin of the Charter in the words, '*juribus que regalibus.*' For, as explained by Blackstone, 'originally all *jura regalia* were granted to the Lords of these Counties Palatine,' who 'had, of course, the sole administration of justice by their own judge appointed by themselves, and not by the Crown.' 3 Blackstone's Com. 78.

"And among the enumerated powers set forth in the Charter was the exclusive right to establish shipping ports in the waters and to regulate and collect taxes and subsidies for their use.

"It is evident this true and absolute Lord and Proprietary, 'saving always the faith and allegiance and sovereign dominion due to the King,' had become endowed,

by the most certain, specific, and favorable form of tenure, of an *imperium in imperio.*

"The Charter contained a still more remarkable instance of the royal favor. The statute *qui emptores* passed to strengthen the lands of the King by forbiding intermediate feoffees from subinfeudating their lands, was expressly nullified within the Province of Maryland in favor of the Lord Proprietor, by section 18; although its provisions had been enforced in England against the great Lords of the realm since 1290. So that each grantee of Lord Baltimore, instead of holding of the King of England 'as chief Lord of the fee, was to hold of his immediate feoffor,' the Lord Proprietor.

"We shall proceed to examine the pretensions of the various claimants in the order in which they are classified above.

"1. The Claims of the Marshall Heirs.

"The most extensive of these claims is that made by the parties who describe themselves as the Marshall Heirs. Some of them claim as heirs and descendants of James M. Marshall; and others as heirs and descendants of Chief Justice John Marshall, the brother of James M. Marshall. According to their pretensions they are entitled to all rights to the Potomac River and to the soil beneath its waters and to all the islands therein, by virtue of the successive grants of Charles II, of the 18th of September, 1649, to Lord Hopton and others; of the same King, of the 8th of May, 1660, to the Earl of St. Albans and others; and of James II to Lord Culpeper, of the 20th of September, 1688.

"These rights, it is contended, devolved upon Lord Fairfax, partly as purchaser and partly as heir at law of Culpeper. The heirs at law of James M. Marshall and of John Marshall contend that these rights of Lord

Fairfax were by his will of the 8th November, 1777 (Testimony, Vol. 3, page 1136), devised to his nephew, Denny Martin, who subsequently assumed the name of Fairfax; and that on the 30th of August, 1797 (Vol. 3, page 1312), Denny Fairfax, claiming as such devisee, conveyed those interests to James M. Marshall under which conveyance the heirs at law of the said James claim entire right to the properties thereby conveyed. On the other hand, the heirs at law of John Marshall, in their petition praying to be admitted as parties to this suit insist that their ancestor, John Marshall, was jointly interested with the said James M. Marshall in the property known as the Northern Neck of Virginia (Vol. 1. 363), and in their answers (Vol. 1, 363), contend that the conveyance to James M. Marshall was in trust for the common benefit of both John and James, and has been recognized as such by the heirs at law of James since his death.

"The Court is not required to decide between these conflicting pretensions.

"The grant to Culpeper was given more than sixty years after the annulment of the Charter of the London companies and the re-establishment of the territory of Virginia as a Royal Government, and more than fifty years after the Charter to Lord Baltimore *of the River Potomac to high-water mark on the southern shore with all the islands therein.* The terms of the grant from James confirmed to Culpeper the entire territory 'situate, lying and being in Virginia, in America, and bounded by and within the first heads or springs of the Rivers Rappahannock and Potomac;' 'together with the said rivers themselves and all the islands within the uttermost banks thereof.'

"These grants carried with them nothing but the right of soil; no rights of government were conferred by them,

for it was expressly declared those were to remain in the Royal Governor and Council of the Dominion of Virginia, to whom, at Jamestown, the grantees were to render annually the tribute required to be paid to the King and his successors, in lieu of all services and demands. The territory granted was described as 'being in Virginia, in America;' from which the Province of Maryland had already been severed by the declaration in the Baltimore Charter that its territory should not thenceforth be held or reputed a part of the land of Virginia.

"After the vacation of the London Company's Charters in 1624, the Crown of course had the perfect right to grant in its pleasure any part of the remaining land of what had thus become the Royal Government of Virginia; but it had no power to grant any part of the territory previously granted to Baltimore as Lord Proprietor of Maryland, *except with his consent,* or after his title had been divested by legal proceedings. As the Supreme Court said in Howard vs. Ingersoll, 13 Howard: '*In proprietary governments the right of soil as well as jurisdiction was vested in the proprietor. These Charters were in the nature of grants, and their limits being fixed by their Charters, could not be altered but by their consent.*'

"*There is no pretence that any such consent was ever given, or that any sentence or decree of divestiture against the Lord Proprietor was ever passed. In the absence of one or other of those conditions such an act would have been 'an outrage that would have cut every Englishman to the bone,'* as the great chancellor said of the proposition to take away the Charter of the East India Company by Act of Parliament, without legal proceedings.

"*It is but just to assume that no such invasion of the rights of Lord Baltimore was intended.* Neither the

times at which the grants profess to have been given nor the surrounding circumstances were propitious for the accurate ascertainment of boundaries in remote countires 'inhabited by savages.' The first Charter of Charles II was given after the abolition of monarchy in England, while he was a fugitive in France. On the 8th of May, 1660, the date of his second Charter, he was residing at Breda in the Netherlands, and he did not return to England until twenty days later, after a continuous absence of eleven years. The confirmatory Charter of James II bears date less than three months before his dethronement and flight, and on the eve of the invasion of the Prince of Orange *The grants were never supposed, at the time, to constitute an invasion of Baltimore's rights in the Potomac.* McMahon (51), says, that 'as they call for the lands lying on the south side of the Potomac to its head, there was nothing in them inconsistent or clashing with the call in the Maryland Charter—the only difficulty arose in the determination as to which fork of the river was the first fountain;' *nor is the question as to the right of Maryland to the whole river discussed in his history.* And the Act of Virginia of 1748 recites that in the dispute and controversy touching the limits and boundaries of the said letters patent under which Fairfax claimed, it had been adjudged and determined by the King in Council that they 'include all that tract or territory of land between the rivers Potomac and Rappahannock;' and neither in this or in any other statute of that State *have we found any claim of ownership by Virgina of the river Potomac or of the soil beneath it.* A diligent search by the compiler of the Calvert Papers (published in Baltimore in 1894, page 110), has disclosed a letter from Benjamin Tasker of September, 1774, mentioning an assault upon a grantee under a Maryland patent of an island in the

Potomac, by one claiming under Lord Fairfax's grant; but the context perhaps may equally indicate he refers to 'that part near the fountain head of the Potomac,' then already lost to Maryland. Nor does the history of the times disclose any exercise of a claim to the waters of the river or the soil beneath it on the part of the grantees in the three said patents (other than that just referred to), from the date of the grants; although a land office was opened by Lord Fairfax and patents were issued repeatedly by him of lands between the two rivers. * * *

"As there were no governmental rights conferred by the Hopton and Culpeper Charters, no right to any soil under the waters of a navigable river could have passed, except as a riparian privilege to abutting land. * * * * * * * * * * *

"On the other hand, there is unquestionable proof of the continued exercise of the authority to issue patents for islands in the river by Lord Baltimore after the date of the Fairfax grants. The evidence laid before the Joint Commission by the counsel for the State of Maryland, containing copies of the patents issued by Maryland for such islands between 1639 and 1800, shows that twenty of them were issued after 1688, eight of which appear on their face to have been granted to citizens of Virginia. In one of the latter class the Supreme Court, in 6 Cranch (Lodge's Lessee vs. Lee) 237, sustained the validity of the Maryland patent, issued to Lodge in September, 1720, for an island said to contain a designated number of acres above the second falls of the Potomac. Ludwell Lee, described as a citizen of Virginia, in 1795, obtained a junior patent from Maryland for a numebr of acres in the island in excess of the number named in Lodge's patent. Lodge brought ejectment in Montgomery County, Maryland, and the case was removed to the United States Circuit Court

for Maryland on the motion of Lee as a resident of Virginia; which gave judgment for the plaintiff. The original papers in that Court show that the controversy involved only the extent of the grant—there being no dispute as to the authority of Maryland to issue the Lodge patent.

"It being thus clear that the grants to Hopton, St. Albans and Culpeper never included the Potomac River or the land beneath its waters, no conveyance from either of them, and no conveyance or devise from Thomas, Lord Fairfax, whether directly or by way of residuary disposition, could be effectual to communicate to Denny Fairfax or to any other person, any such interest in the river or its waters—and that no conveyance from Denny Fairfax could confer any such rights upon the Marshalls as are claimed in these proceedings."

In affirming this decision, in the case of Morris vs. United States, 174 U. S. 223, this Court said:

"The first question for our determination arises out of the claims of the heirs of James M. Marshall and the heirs of John Marshall to the ownership of the entire bed of the Potomac River, from shore to shore, including therein the reclaimed lands.

"Their claims are based upon two distinct lines or sources of title, inconsistent with each other—one originating in the Charter granted by Charles I, King of England, on June 20, 1632, to Cecilius Calvert, second Baron of Baltimore and first Lord Proprietary of the Province of Maryland; the other, in the Charter granted by James II, King of England, on September 27, 1688, to Thomas, Lord Culpeper.

"We do not think it necessary to enter at length or minutely into the history of the long dispute between

Virginia and Maryland in respect to the boundary line. It is sufficient, for our present purpose, to say that the grant to Lord Baltimore, *in unmistakable terms, included the Potomac River* and the premises in question in this suit, and declared that thereafter the Province of Maryland and its freeholders and inhabitants should not be held or reputed a member or part of the land of Virginia, 'from which we do separate both the said Province and inhabitants thereof.'

"On September, 1688, King James II, by his royal patent of that date, granted to Thomas, Lord Culpeper, what was called the Northern Neck of Virginia, and described as follows:

"'All that entire tract, territory or parcel of land situate, lying and being in Virginia, in America, and bounded by and within the first heads or springs of the rivers of Tappahannock al^s^ Rappahannock and Quiriough al^s^ Patawonuck Rivers, the courses of said rivers from their said first heads or springs as they are commonly called and known by the inhabitants and descriptons of those parts and the Bay of Chesapeake, together with the said rivers themselves and all the islands within the outermost banks thereof, and the soil of all and singular the premises, and all lands, woods, underwoods, timbers and trees, wayes, mountains, swamps, marshes, waters, rivers, ponds, pools, lakes, water courses, fishings, streams, havens, ports, harbours, bays, creeks, ferries, with all sorts of fish, as well whales, sturgeons and other royal fish * * * To have, hold and enjoy all the said entire tract, territory or portion of land, and every part and parcel thereof, * * * to the said Thomas, Lord Culpeper, his heirs and assigns forever.'

"Owing to the conflicting descriptions, as respected the Potomac River, contained in these royal grants, a controversy early arose between Virginia and Maryland.

A compact was entered into in 1785 between the two States whereby, through commissioners, a jurisdictional line, for the purpose of enforcing the criminal laws and regulating the rights of navigation in the Potomac River, was agreed upon.

"Finally, the controversy as to the true boundary still continuing, in 1874, the Legislatures of the two States agreed in the selection of arbitrators, by whose award, dated January 16, A. D. 1877, the jurisdictional line and boundary were declared *to be the low-water mark on the Virginia shore.* This award was accepted by the two States, and, by an Act approved March 3, 1879, c. 196, 20 Stat. 481, Congress gave its consent to the agreement and award, but provided that nothing therein contained should be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which formed the subject of the said agreement or award.

"It was a mutual feature of the legislation by which this conclusion was reached that the landholders on either side of the line of *boundary between the said States, as the same might be ascertained and determined by the said award,* should in no manner be disturbed thereby in their title to and possession of their lands, as they should be at the date of said award, but should in any case hold and possess the same as if their said titles and possession had been derived under the laws of the State in which, by the fixing of the said line by the terms of said award, they should be ascertained to be. (Act of Virginia, February 10, 1876, chap. 48; Act of Maryland, April 3, 1876, chap. 198.)

"Whether the result of this arbitration and award is to be regarded as establishing what the true boundary always was, and that therefore the grant to Thomas, Lord Culpeper, never of right included the Potomac

River, or as establishing a compromise line, effective only from the date of the award, we need not determine. For, even if the latter be the correct view, we agree with the conclusion of the Court below, that, upon all the evidence, *the Charter granted to Lord Baltimore,* by Charles I, in 1632, of the territory known as the Province of Maryland, *embraced the Potomac River and the soil under it, and the islands therein, to high-water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper.*

"The record discloses no evidence that at any time any substantial claim was ever made by Lord Fairfax, heir at law of Lord Culpeper, or by his grantees, *to property rights in the Potomac River or in the soil thereunder, nor does it appear that Virginia ever exercised the power to grant ownership in the islands or soil under the river to private persons.* Her claim seems to have been that of political jurisdiction.

"Without pursuing further this branch of the subject, and assuming that the heirs of John Marshall have become lawfully vested with the Fairfax title, we are of opinion that they have failed to show any right or title to the lands and premises involved in this litigation, and that the decree of the Court below, so far as it affects them, is free from error."

Chancellor Bland, of Maryland, one of the most just and learned jurists that this country has produced, announced the same view, interpreting the Charter of Maryland to the same effect.

In Binney's Case, 2 Bland's Chancery Rep., p. 99, it was judicially declared that the Potomac River belonged entirely

to Maryland, both above and below tide. In that case, Chancellor Bland said:

"This compact of the 28th of March, 1785, is confined exclusively to matters of jurisdiction and navigation; it leaves the territorial rights of the parties untouched. In rivers flowing through conterminous States a common use is presumed; if there be no proof of a peculiar property excluding the universal or the common use. Vattel, b. 1, c. 22; The Twee Gebroeders, 3 Rob. Ad. Rep. 339; Wright vs. Howard, 1 Cond. Chan. Rep. 95; Handly's Lessee vs. Antony, 5 Wheat. 375; Landhold. Ass. 170. But in this instance there is the most satisfactory evidence of an exclusive right. The boundary called for in the Charter to the Lord Proprietary of Maryland is from 'the first fountain of the River Potomac, thence verging towards the south unto the further bank of the said river, and following the same on the west and south unto a certain place called Cinquack, situate near the mouth of the said river,' etc. Chart. Maryland, s. 3. To the full extent of this call for the *bank of the Potomac*, Maryland has always held, and, under that holding, all the islands in the river have been granted by patents issuing from the Land Office or under legislative enactments, or titles derived from this State; 1822, ch. 54; *and the whole of the bed of the river, above tide, it is believed, has always been admitted to be rightfully parcel of the territory of Maryland.* Whether the south or the north branch should be considered as the true boundary has long been, and still is, a matter of controversy; but before the Revolution many patents for lands, lying between the north and south branches were issued by the Lord Proprietary of Maryland. Landhold. Ass. 173; Proc. Conven., Maryland, 30th October, 1776; Resolutions, 1785, No. 1; 1795, No. 3; 1796, No. 5; 1801, No. 10; 1806, No. 10;

Foster and Elam vs. Neilson, 2 Peters, 307; 3 Jefferson's Correspondence, 347; Votes and Proc. H. Del., 24th January, 1824.

"Hence I feel perfectly satisfied that the Potomac, above tide, was originally a private innavigable river; that it is now, in no other manner and to no greater extent, to be deemed a navigable highway than it has been expressly so declared, or than as it forms a part of the route of the navigation formed by the Potomac Company, which alone has been declared to be a highway, common to Maryland and Virginia; *that the whole of the river to its right bank forms a part of the territory of the State of Maryland; that the whole of it above tide is entirely within the bodies of the respective counties of Maryland lying along it;* and, consequently, that its waters above tide may be taken and used by riparian holders of land in any manner, without prejudice to others."

In Biscoe vs. State, 68 Maryland, 294, 296, the Court of Appeals of that State, in the year 1888, declared:

"By the Charter granted to Lord Baltimore, *the Potomac River belongs to the State of Maryland.* * * * The Counties of the State are but territorial divisions established for public and local purposes connected with the administration of the government, and the *Circuit Courts of the several Counties lying on the Potomac River*, as Courts of record, having original jurisdiction, exercise a common law jurisdiction over offenses committed *on said river* opposite the shores of such Counties. * * * And *the Potomac River being part of the State and subject therefore to its jurisdiction*, the Circuit Courts of the several Counties bordering on said river, as common law Courts, exercise criminal jurisdiction over offenses committed on said river opposite such counties."

In Doddrige vs. Thompson, 9 Wheaton, 469, where this Court had under consideration the reserve contained in the Cession Act of Virginia of 1784, and the Acts of Congress of August 10, 1790, Chapter 67, and of June 9, 1794, Chapter 238, the whole country *lying between the Scioto and Little Miami Rivers* was subject to the military warrants of Virginia to satisfy which the reserve was made. This Court held that the territory lying between the two rivers under the reservation was the whole country *from their sources to their mouths;* and that as no branch of either of them had acquired the name, exclusive of another, the *main branch,* from its head to its source, must be considered as the true river. In delivering the opinion of the Court, Chief Justice Marshall said:

> "It is not, we think, to be questioned that under the reserve contained in the Cession Act of Virginia, and under the Acts of Congress which have been recited, the whole country lying between the Scioto and Little Miami was subjected to the military warrants to satisfy which the reserve was made, and any part of it might be surveyed for any person holding such warrant.
>
> "What is the extent of this county?
>
> "The plaintiff contends, that it is the territory between the Ohio, into which both rivers empty, and a line to be drawn from the source of the main branch of one river to the source of the main of the other, and the rivers themselves, *from their sources to their mouths.*
>
> "The Scioto is a much longer river than the Little Miami, and the defendant has suggested that the country reserved may be limited by the Ohio on one side, and a line drawn from the source of the Miami to the Scioto, which shall be parallel with the Ohio, on the other side. But this suggestion has not been pressed; and the idea it conveys is directly opposed to the words of the re-

serve, and the construction which has been uniformly given to the deed of cession by both the contracting parties. The territory lying between two rivers is the whole country, *from their sources to their mouths;* and if no fork of either of them has acquired the name, in exclusion of another, *the main branch, to its source, must be considered as the true river.* Any other rule would be arbitrary, depending on caprice, not on principle; and the whole legislation of Congress upon the subject shows, we think, a disposition to be guided by this reasonable rule."

In Handley's Lessee vs. Anthony, 5 Wheaton, 374, construing the Cession by Virginia to Congress of all her right to the territory "situate, lying and being to the northwest of *the River Ohio,*" Chief Justice Marshall, delivering the judgment of this Court in 1820, after quoting these words of the grant, said:

"And this territory, according to express stipulation, is to be laid off into independent States. These States, then are to have *the river itself, wherever that may be,* for their boundary. This is a natural boundary, and, in establishing, Virginia must have had in view the convenience of the future population of the country. * * * *The river, however, is the boundary.* 'In case of doubt,' says Vattel, 'every country lying upon *a river* is presumed to have no other limits but *the river itself,* because nothing is more natural than to take a river for a boundary when a State is established on its borders; and wherever there is a doubt, that is always to be presumed which is most natural and probable.' * * * In great questions which concern the boundaries of States, where great natural boundaries are established in general terms, with a view to public convenience and the avoidance of controversy, we think the great object, where it can be

distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals. The State of Virginia intended to make the great *river Ohio, throughout its extent, the boundary* between the territory ceded to the United States and herself. When that part of Virginia which is now Kentucky became a separate State, the river was the boundary between the new States erected by Congress in the ceded territory and Kentucky. *These principle and considerations which produced the boundary ought to preserve it.*"

In Howard vs. Ingersoll, 13 Howard, at page 415, Mr. Justice Wayne, delivering the opinion of the Court, and defining what constituted the bed of a river, clearly indicated it as running from its source to its mouth, saying:

"The outer line on the bed of a river, on either side of it, may be distinguished upon every stage of its water, high or low; at its highest or lowest current. It neither takes in overflow land beyond the bank, nor includes swamps or low grounds liable to be overflowed, etc. But it may include spots lower than the bluff or bank where there is not a growth upon them, not forming a part of that land which, whether low or high, we know to be upland or fast lowland, if such spots are within the bed of the river. *Such a line may be found upon every river from its source to its mouth. It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river in any stage of water. With such an understanding of what a river is, as a whole, from its parts, there is no difficulty in fixing the boundary line in question.*"

The same construction is supported by the principle laid down by Vattel, Book I, ch. 22, p. 5, and quoted with ap-

proval by this Court in Howard vs. Ingersoll, 13 Howard, pages 424-425, as it had formerly been quoted in Handley's Lessee vs. Anthony, *supra*, upon which Chancellor Bland relied in stating his construction of the Charter, as quoted above:

> "Every country lying upon a river is presumed to have no other limits but the river, because nothing is more natural than to take a river for a boundary when a State is established on its borders; and wherever there is doubt, that is always to be presumed which is most natural and probable."

In Reynolds vs. M'Arthur, 2 Peters, p. 437, it was contended, as a proposition of law, "that the sources of the two rivers there in question must be at that point in their respective channels at which, from the union of several streams, sufficient water flows at an ordinary stage on which to navigate small vessels laden." But Chief Justice Marshall, speaking for the Supreme Court, unequivocally repudiated this proposition, saying:

> "This rule for ascertaining the source of a river is entirely new in this country. A stream may acquire the name of a river which is not navigable in any part. A river which is navigable may retain that name above the highest navigable point. The meaning of words as commonly used must be changed before the source of a river can be confounded with its highest navigable point."

Mr. Justice Story, in his Commentaries on the Constitution, likewise interprets and defines the boundaries of Maryland as established by its Charter:

> "The territory was bounded by a right line drawn from Watkin's Point, on Chesapeake Bay, to the ocean on the east, thence to that part of the estuary of Del-

aware on the north which lieth under the 40th degree, where New England is terminated; thence in a straight line by the degree aforesaid to the meridian *of the fountain of Potomac; thence following its course by the farther bank* to its confluence with the Chesapeake; and thence to Watkin's Point. (1 Story's Commentaries on Constitution, sec. 103.)"

In Alexandria Canal, Railroad and Bridge Company vs. District of Columbia, 9 Washington Law Reporter, 452, the Supreme Court of the District of Columbia said:

"By reiterated decisions it has been perfectly settled that the whole bed of the Potomac River, with all the islands therein, up to high-water mark on the Virginia shore, are within the explicit terms of the Maryland Charter. An interesting point of grammatical construction in the Latin of the original Charter demonstrates this. In describing the boundary, the Charter declares that the line should pass from Delaware Bay in a right line by the 40th degree of north latitude westwardly 'unto the true meridian of the first fountain of the River Potomac; thence verging towards the south unto the farther bank of the said river, and following the same on the west and south unto a certain place called Cinquack;' etc. In the English translation, the expression 'the same' may be equally applied to the bank or to the river. In the latter case the line would be the middle thread of the river, which would have divided it equally with the State of Virginia. But the language in the Latin of the Charter is *'ad ulteriorem dicti fluminis ripam et eam sequendo,'* etc.; and the use of the feminine relative pronoun *'eam'* shows that the *'ripam'* which is feminine, was the antecedent referred to, rather than *'flumen'* which is neuter."

Bancroft, in his History of the United States, in his discussion of the Charter of Maryland, Volume 1, Chapter 7, pages 241-2, interprets its definition of the boundaries of the Province in precisely the same manner, as follows:

> "The fundamental Charter of the Colony of Maryland was the sufficient frank pledge of the liberties of the colonists, not less than of the rights and interests of the Proprietary. The ocean, the fortieth parallel of latitude, the meridian of the *western fountain of the Potomac,* THE RIVER ITSELF FROM ITS SOURCE TO ITS MOUTH, and a line drawn due east from Watkin's Point to the Atlantic—*these were the limits of the territory,* which was now erected into a Province and from Henrietta Maria, the daughter of Henry IV and wife of Charles I, received the name of Maryland."

And the same eminent historian and publicist adds on the following page (243):

> "As a Catholic, he (Lord Baltimore) needed to be *free from the jurisdiction of his neighbor; Maryland was carefully separated* from Virginia; nor was he obliged to obtain the royal assent to the appointments or the legislation of his Province, nor even to make a communication of the results."

The late John V. L. McMahon, whom this Honorable Court will recall as among the very foremost of the eminent lawyers whom Maryland has produced, interpreted her Charter similarly in this particular. On page 49 of his History of Maryland he refers to

> "The description of 'the first fountain of the Potowmack' as *the common terminus of the western and southern boundaries* of Maryland."

And on page 51 of the same work he says again:

"Those grants of the Northern Neck (of Virginia), as it will be perceived, call for the lands lying *on the south side* of the Potomac *to its head,* and in this call there was *nothing* inconsistent or clashing with the call of the Charter of Maryland. The call of the latter is TO *the first fountain or source of the Potomac,* which was, of course, *its head,* and therefore, a conflict between these two grants could only arise from the extrinsic difficulty or doubt as to the true location of the first fountain or head."

Again, at page 69, Mr. McMahon says:

"As to the *chartered* extent of Maryland, there can be little room for doubt. *'The first fountain of the Potomac'* is evidently a descriptive term intended to designate the *most westerly source* * * * The claims of Maryland will, of course, extend to her *chartered limits."*

Another most distinguished jurist, the late Chief Justice Alvey, held the same view of the boundaries of Maryland as ascertained by its Charter. This view was distinctly stated by him while practicing at the bar in his prevailing argument in the Court of Appeals of Maryland in the case of O'Neal vs Virginia and Maryland Bridge Company, 18 Maryland, 1. His statement, on pages 16 and 17 of the Report, is as follows:

"The Charter of Maryland defines the *southern* boundary to be *from* 'the first fountain of the river Potomac, etc. * * * And the *whole of the bed* of the river, *above tide,* it is believed, has *always been admitted to be rightfully parcel of the territory of Maryland.'* Binney's Case, 2 Bland, 127. * * * Seeing, then, that *the entire Potomac* 'unto the further bank of said river' is within the chartered limits of Maryland, etc.' "

In McSherry's History of Maryland, pages 117-118, written by the father of the late lamented Chief Justice McSherry, of Maryland, the same interpretation is thus explicitly set forth:

> "*In the Charter of no colony were the boundaries more distinctly laid down than in that of Maryland, and yet no colony has been subjected to greater difficulties about limits, or robbed of larger or more valuable territory. Its extent was marked out in the Charter by five lines,*—beginning at a point on Chesapacke called Watkin's Point, near the river Wighco, and running east to the ocean—then, by the Delaware Bay, to that point of the bay under the 40th degree,—*then, by that degree, due west, until it reached the meridian of the first fountain of the* Potomac,—then, by that meridian, *to the first fountain;* and lastly by the southern shore of that river to the bay and cross to Watkin's Point."

Professor William Hand Browne, of the Johns Hopkins University, in his "Maryland: The History of a Palatinate," in the "American Commonwealths" Series (Houghton, Mifflin and Company, Boston, 1899), page 18, also states:

> "The boundaries of Maryland, unlike those of the other Colonies, were precisely defined. Its limits were: on the north, the fortieth parallel of north latitude; *on the west and southwest, a line running south from this parallel to the farthest source of the Potomac;* and *thence by the farther or western bank* of that river to Chesapeake Bay; on the south by a line running across the Bay and peninsula to the Atlantic; and on the east by the ocean and the Delaware Bay and River."

In Scharf's History of Maryland, Volume I, pages 409-410, the same view of the "first fountain of the Potomac" as

the "*terminus* of the *western* and *southern* boundaries of Maryland" is given. On page 410 that author says:

> "This grant of the northern neck called for the lands lying on the south side of the Potomac to its *head,* while the Charter of Lord Baltimore called for all the land to the *fountain or source* of the Potomac, which was of course its *head.* At first there were no disputes about the true location of the common call, but as soon as the settlements began to extend towards the head of the Potomac, jealousies and difficulties broke out between the two proprietaries. Lord Baltimore, who claimed from the head of the south branch of the Potomac, its first fountain, remonstrated at a very early period with the Virginians, who had undertaken to define his limits by granting lands to the north branch. Notwithstanding these protests, since the year 1753, Fairfax continued to adhere to the line as adjusted by him, and the Proprietary of Maryland continued to assert his claim at the first fountain as provided by his Charter. In 1771, Colonel Thomas Cresap made the first actual examination and survey of the two branches of the Potomac, and he decided that the south branch was the most western source, and therefore *the first fountain.* Various attempts have been made from time to time by Maryland to settle the controversy, but Virginia has rejected all propositions up to this day (1878), except that of unqualified submission to her demands. The extent of territory between the two branches is estimated at half a million acres, including some of the most fertile lands of Virginia."

In Professor Steiner's "Institutions and Civil Government of Maryland" (Ginn & Co., 1899), page 2, the southern and western boundaries of Maryland are described as from the mouth of the Potomac, "along the south bank of

that river to the source of its north branch; on the west the meridian of the source."

"Where a water course has its *source in a spring,* such *source is itself a part of* the water course."

30 American and English Encyclopædia of Law, title "Waters and Water Courses," sub-title "Source," pages 351-352.

Dudden vs. Guardians of the Poor, 1 H. & N. 627.

Tate vs. Parrish, 7 T. B. Mon. (Ky.) 325.

Colrick vs. Swinburne, 105 N. Y. 503.

Fleming vs. Davis, 37 Texas, 173.

Arnold vs. Foot, 12 Wendell, 330.

Evans vs. Merriweather, 3 Scammon (Ill.), 495-497.

In Dudden vs. Guardians of the Poor, *supra,* the law was declared by Chief Baron Pollock to be "clear and undoubted" that a natural spring which is the source of a stream or river is a part thereof.

Baron Martin said:

"The owners of land adjoining a stream, *from its source to the sea,* have a natural right to the use of the water of it. *A river begins at its source, where it comes to the surface."*

Baron Watson said:

"This was an ancient spring with which the defendants had no right to interfere It is clear that they could *not* have diverted it *at ten yards from the source, and the stoppage at the spring head is just as much a diversion as if the water had been taken lower down."*

"Where the water of a spring flows from a regular channel into a brook, the person is not relieved from liability for di-

verting it by the fact that he took the water from the spring head before it flowed into the natural channel."

2 Farnham on Waters and Water Courses, section 501, page 1656.

See also—Wright vs. Brown, 1 Simon and Stuart Reports, 203.

In Gould on Waters, section 41, entitled "River and Water Course Defined," the learned author says:

> "It is a river or water course from the point where the water comes to the surface and begins to flow in a channel until it mingles with the sea, the arms of the sea, lakes, etc."

"Where a natural monument is called for on a description of the boundaries of land, the identification of the object intended by the description is to be determined by a fair and reasonable construction of the *whole instrument,* regard being had in all cases to the true intent of the parties as expressed therein."

5 Cyc. "Boundaries," page 869.
Horne vs. Smith, 159 U. S. 40.
Reynolds vs. McArthur, 2 Peters, 417.
Handley's Lessee vs. Anthony, 5 Wheaton, 377.
Meredith vs. Pielert, 9 Wheaton, 573.
8 Century Digest, *tit.* Boundaries, sect. 43.

"The Court must place itself as nearly as possible in the situation of the contracting parties at the time the deed was made in order to ascertain their intent."

4 American and English Encyclopedia of Law, title "Boundaries," page 796.

The language of a patent must be construed with reference to the understanding between the parties, at the time it issued, as to the real location of the surveys mentioned in it, where it is sought to establish the boundary line between adjoining surveys thereby.

Standlee vs. Burkett, 78 Tex. 620.

THE ISSUES.

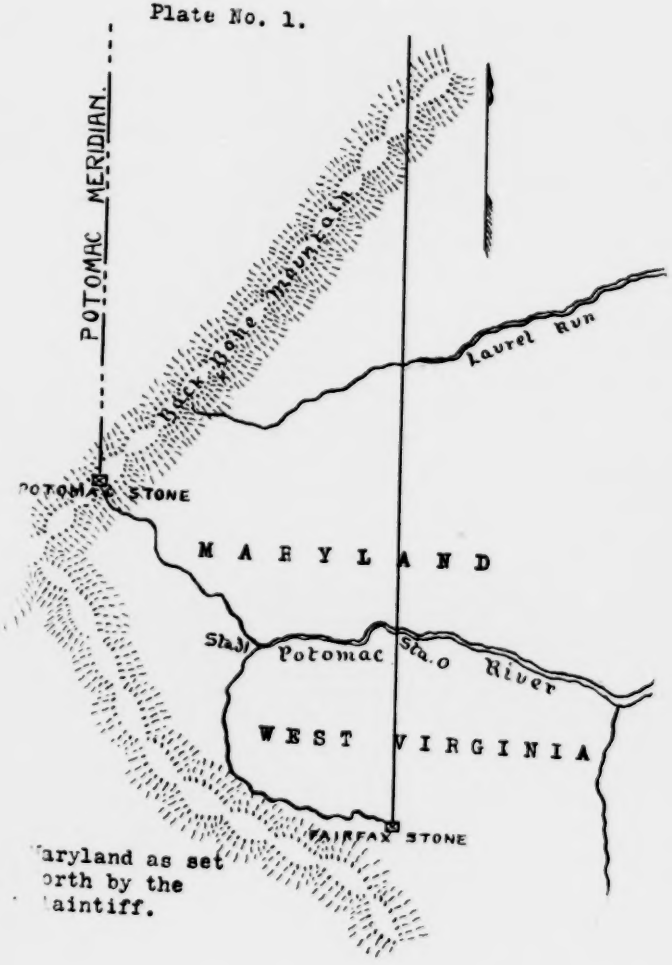
WHAT AND WHERE IS THE "FIRST FOUNTAIN" OF THE NORTHERN BRANCH OF THE POTOMAC RIVER AS CALLED FOR IN THE CHARTER OF LORD BALTIMORE?

The true and settled construction of the Charter of Maryland, with respect to its boundaries, being as above set forth, and there having been no agreement or compact between the States parties to this suit settling the western boundary of the State of Maryland, and leaving out of consideration the Southern Branch of the Potomac River, which runs to the southwest diagonally across the State of West Virginia, *and assuming that the Northern Branch is the main stream of the Potomac River,* the questions presented for the Court's determination are:

First—What and where is the true first fountain of the Potomac River, as the same is called for in the Charter of Lord Baltimore?

Second—Has the State of Maryland done anything so far as the Record discloses, to destroy her right to the plain and imperative call in her Charter for the meridian of the first fountain, or to disentitle her to the benefit thereof?

Plate No. 1.



aryland as set
orth by the
laintiff.

I.

THE STATE OF MARYLAND STANDS UPON THE CALLS IN HER CHARTER TO LORD BALTIMORE AS PARAMOUNT, CONTROLLING AND FINAL IN DELIMITING AND FIXING HER WESTERN AND SOUTHERN BOUNDARIES.

"Fairfax Stone" Does Not Stand at the First Fountain of the Potomac River.

The contentions of the respective parties to this suit as to the true location of the First Fountain of the Potomac River are illustrated upon Plate No. 1, which is shown upon the opposite page of this Brief. As will be seen from said plate, the respective and relative positions of "Fairfax Stone" and "Potomac Spring" appear thereon, as well as sections of the meridian lines running north through and from each of said points, while the head waters and the main body of the Potomac River are also represented upon said plate in relation to the said "Fairfax Stone" and "Potomac Spring."

Maryland maintains that the first fountain of the Potomac River is at the point designated "Potomac Spring" upon the said plate, and that this point marks the westernmost source of the Potomac River, and is the point through which the meridian determining her western boundary must be drawn according to the call in the Charter of Lord Baltimore. West Virginia contends that the point designated "Fairfax Stone" upon said Plate No. 1 and within her own territory marks the position of the first fountain of the Potomac River, and is the point called for in the Charter of Lord Baltimore through which said meridian line is to be run. The contention of West Virginia, that "Fairfax Stone" stands at the first fountain of Potomac River is based solely upon the determination of the Commissioners appointed in 1733 to adjust the boundaries of the Northern Neck of Vir-

ginia, otherwise known as the "Fairfax Grant." Among the duties imposed upon these representatives of Lord Fairfax and the Royal Government of Virginia was that of fixing, by actual survey, the western boundary of the Fairfax Grant running from the head of the Rappahannock River to the head of the Potomac River. In the performance of this duty the Commissioners, having located a spring which they believed to be the head of the North Branch of the Potomac, planted there the stone known as the "Fairfax Stone," to mark the location of the head of the river as determined by them.

Lord Baltimore was not a party to the location of this stone, and had no interest whatever in the controversy which led to the running of the line from the head of the Rappahannock to the "Fairfax Stone."

The attention of the Proprietary of Maryland was not called to the running of said line and the setting up of the "Fairfax Stone" until more than seven years after it had been done, and the Colonial Government of Maryland, as soon as knowledge came to it of what had been done, at once disavowed and remonstrated against the proceeding which led to the fixing of "Fairfax Stone" and denied the right of both the Royal Government of Virginia and Lord Fairfax to fix and conclude its boundaries in a controversy to which it was not a party, and of which it had no knowledge.

At the time the Fairfax Stone was set up as a boundary between Lord Fairfax and the Colony of Virginia, Charles Calvert was the Proprietary of Maryland and as soon as knowledge of what had been done looking to the settlement of the conflicting interests and territorial claims of Lord Fairfax and the Colony of Virginia, was brought to the attention of Frederick, the successor of Charles Calvert, in 1753, he immediately protested against what he considered to be an invasion of his rights and of his territory, because he claimed jurisdiction to the head of the South branch of the Potomac

River. This remonstrance was communicated to Lord Fairfax without delay, accompanied by an assertion of claim to territory and jurisdiction to the head of the South branch of the Potomac River.

Lord Fairfax, in acknowledging the receipt of this remonstrance, took occasion to say that he perceived that Lord Baltimore meant to dispute with him whether the head spring of the Potomac River was at the source of the South or the North branch.

This correspondence between Lord Baltimore and Lord Fairfax relative to this matter is set forth in Appendix A of this brief. It will be seen that the State of West Virginia bases her claim that the Fairfax Stone marks the first fountain of the Potomac River solely and entirely upon the result of a proceeding in which the Proprietary of Maryland was in no way interested; to which he was not a party, and by which, upon every principle of justice and equity, his rights could not be concluded nor he be despoiled of his estate.

The principle is fundamental that no man can be deprived of his property except by due process of law, and that judgments and decrees only conclude parties and privies, and this principle is embodied in the Federal Constitution as well as in the organic law of the several States of the Union. It is hardly necessary to cite authority in support of this fundamental principle of all jurisprudence, so well known is this doctrine and so universal is its application.

And this has been so expressly adjudicated by this Court.

In the case of U. S. vs. Morris, 23 Washington Law Reporter, 745, 750, etc., it was said:

> "The grant to Culpeper was given more than sixty years after the annulment of the Charter of the London Companies and the re-establishment of the territory of Virginia as a Royal Government, and more than fifty

years after the Charter to Lord Baltimore of the River Potomac to high-water mark on the southern shore with all the islands therein. The terms of the grant from James confirmed to Culpeper the entire territory 'situate, lying and being in Virginia, in America, and bounded by and within the first heads or springs of the Rivers Rappahannock and Potomac;' 'together with the said rivers themselves and all the islands within the uttermost banks thereof.'

"These grants carried with them nothing but the right of soil; no rights of government were conferred by them, for it was expressly declared those were to remain in the Royal Governor and Council of the Dominion of Virginia, to whom, at Jamestown, the grantees were to render annually the tribute required to be paid to the King and his successors, in lieu of all services and demands. The territory granted was described as 'being in Virginia, in America;' from which the Province of Maryland had already been severed by the declaartion in the Baltimore Charter that its territory should not 'thenceforth be held or reputed a part of the land of Virginia.'

"After the vacation of the London Company's Charters, in 1624, the Crown, of course, had the perfect right to grant at its pleasure any part of the remaining land of what had thus become the Royal Government of Virginia; but it had no power to grant any part of the territory previously granted to Baltimore as Lord Proprietor of Maryland, except with his consent, or after his title had been divested by legal proceedings. As the Supreme Court said in Howard vs. Ingersoll, 13 Howard: 'In proprietary governments the right of soil as well as jurisdiction was vested in the proprietor. These charters were in the nature of grants and, their limits being fixed by their charters, could not be altered but by their consent.'

"There is no pretense that any such consent was ever given, or that any sentence or decree of divestiture against the Lord Proprietor was ever passed. In the absence of one or other of those conditions such an act would have been 'an outrage that would have cut every Englishman to the bone,' as the great Chancellor said of the proposition to take away the charter of the East India Company by Act of Parliament, without legal proceedings.

"It is but just to assume that no such invasion of the rights of Lord Baltimore was intended. Neither the times at which the grants profess to have been given nor the surrounding circumstances were propitious for the accurate ascertainment of boundaries in remote countries 'inhabited by savages.' The first charter of Charles II was given after the abolition of monarchy in England, while he was a fugitive in France. On the 8th of May, 1660, the date of his second charter, he was residing at Breda in the Netherlands, and he did not return to England until twenty days later, after a continuous absence of eleven years. The confirmatory charter of James II bears date less than three months before his dethronement and flight, and on the eve of the invasion of the Prince of Orange. The grants were never supposed, at the time, to constitute an invasion of Baltimore's rights in the Potomac. McMahon (51) says, that 'as they call for the lands lying on the south side of the Potomac to its head, there was nothing in them inconsistent or clashing with the call in the Maryland Charter—the only difficulty arose in the determination as to which fork of the river was the first fountain;' nor is the question as to the right of Maryland to the whole river discussed in his history. And the Act of Virginia of 1748 recites that in the dispute and controversy touching the limits and boundaries of the said

letters patent under which Fairfax claimed, it had been adjudged and determined by the King in Council that they 'include all that tract or territory of land between the rivers Potomac and Rappahannock;' and neither in this or in any other statute of that State have we found any claim of ownership by Virginia of the river Potomac or of the soil beneath it."

And this was unequivocally approved by this Honorable Court in Morris vs. U. S., 174 U. S. 225, where it was said:

> "We *agree with the conclusions* of the Court below that, *upon all the evidence*, the Charter granted to Lord Baltimore by Charles I in 1632 of the territory known as the Province of Maryland embraced the Potomac River and the soil under it, and the islands therein, to high-water mark on the southern or Virginia shore; that the *territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any vaild proceedings prior to the Revolution, nor was such grant affected by the subsequent grant to Lord Culpeper.*"

THE LOCATION OF THE FAIRFAX STONE AS THE FIRST FOUNTAIN OF THE POTOMAC RIVER IS AGAINST THE PLAIN PROVISIONS OF THE CHARTER TO LORD BALTIMORE, AND DEFEATS ITS CALLS FOR THE WESTERN AND SOUTHERN BOUNDARIES OF MARYLAND.

The call to the meridian of the first fountain of the Potomac River is absolutely defeated by making the Fairfax Stone the initial point of such meridian. The meridian running north from Fairfax Stone does not fulfill the call either for the western or southern boundary of Maryland, but is irreconcilably in conflict with both.

1. *A meridian drawn north from the Fairfax Stone crosses the main body of the river 4020 feet north of said stone and where the river is 30 feet in width between its banks.*

(See testimony of W. McCulloh Brown, Surveyor on the part of the State of Maryland, Vol. 2 of the Record, page 995.)

With regard to this fact, there is absolutely no dispute in the Record, and the plats of both the plaintiff and defendant are in accord thereupon.

2. *Such meridian not only crosses the main body of the river, but it also crosses the main body of the chief tributary of the river in the neighborhood of its head waters, to wit, Laurel Run.*

A meridian running north from Fairfax Stone not only crosses the main body of the river, as already shown, but it also crosses Laurel Run, the main tributary of the river in the region of its head waters. This fact was ascertained from an actual survey of Laurel Run from its head to its mouth by W. McCulloh Brown, Surveyor on the part of the plaintiff, who states in his returns at page 918 of the Record that:

> "At the end of 22.8 feet on the 79th line of the survey of said stream he crossed the meridian north from Fairfax Stone, which point is shown upon the plat at Station No. 87."

In the testimony of Julius K. Monroe, Surveyor on the part of the defendant, found at page 1753 of the Record, he also states that he crossed Laurel Run in running his line marked "Monroe Line" upon the plaintiff's plat, north from Fairfax Stone.

3. *As determined by the Survey and as shown upon the plat, the stream is nearly two miles in length west of Fairfax Meridian.*

In support of this statement that the Potomac River extends nearly two miles west of Fairfax meridian, we have the result of W. McCulloh Brown's actual survey. Starting at Station "O" and running up the river to Station 31 it was found that the distance between said points was 3842.4 feet, and from Station 31 to Potomac Spring the distance is 6477.7 feet, or a total distance from Station "O" of 10321.1 feet, or 1.9 miles. (See Summary of the Surveyor, pages 973, 974 of the Record.)

In this connection, the attention of the Court is respectfully called to the testimony of Julius K. Monroe, found at pages 1705 and 1706 of the Record, where, upon direct-examination, he testified as follows:

> "Q. No. 807: Going back to the neighborhood of the Fairfax Stone, what is the distance from the Fairfax Stone to the point where you cross the Potomac River?
>
> "A. 242 poles.
>
> "Q. No. 871: Did you, from that point where you crossed the river, survey the river and its main branches above there?
>
> "A. I was with Mr. Brown when he surveyed it; I did not myself."

Upon cross-examination the witness Monroe again admitted that he did not survey the river west of where he crossed it. (Pages 1721, 1722 of the Record.)

If the defendant did not survey the river west of the Fairfax meridian, as it admits it did not, it cannot fairly be heard to question the surveys of that part of the stream as made by the plaintiff.

4. *The call for the southern boundary is to the farther bank of said river and to make the initial line of the meridian the Fairfax Stone the farther or southern bank of the river in running around from Fairfax Stone to Station 31 on the*

plat becomes the north bank of the said river and the call for the southern boundary of Maryland is thus defeated.

This proposition, that to make the Fairfax Stone the initial point of the meridian defeats the call for the southern boundary of Maryland, is founded upon the result of actual survey in this case and the sustained and acknowledged rights of Maryland with respect to her southern boundary. The State of Maryland has uniformly maintained that her jurisdiction and sovereignty extended to the southern shore of the Potomac River from its source to its mouth. This claim is clearly and undeniably supported by the imperative call in her Charter for the farther bank of the Potomac River and thence following it to where the said river empties into the Chesapeake Bay, and as heretofore fully shown, has been conclusively adjudicated by the Courts.

If the whole of the Potomac River to its right or southern bank forms a part of the territory of Maryland, and the whole of it is entirely within the bodies of the respective counties of Maryland lying along it, then the contention of the defendant that the first fountain of the Potomac River is at Fairfax Stone is utterly untenable, because, as the Court will see by reference to the plat in this case, that part of the river rising at or near Fairfax Stone and flowing around to the fork of the river at Station 31, is entirely within the territory of West Virginia over which she exercises exclusive sovereignty, jurisdiction and control.

The State of West Virginia denies the right of the State of Maryland to territory, dominion and control down to the Fairfax Stone, and asserts that the domain and sovereignty of Maryland stop at the point where the main body of the Potomac River is crossed by the meridian drawn through the Fairfax Stone, which point is shown at Station "O" upon the plat. The defendant refuses to allow the plaintiff to follow the river from said Station "O" to Station 31 and thence to Fairfax Stone in the location of her southern boundary,

and claims exclusive title to and autonomy over every part of the Potomac River west of the Fairfax meridian. Upon what theory, then, can Fairfax Stone be held to be a point or call in the boundary of Maryland when, according to the contention and the long settled conduct of the defendant, West Virginia, the Fairfax Stone is included within territory which West Virginia asserts to be her own, over which she now wields undisputed dominion and which is separated by a substantial tract from what West Virginia declares is the boundary line of Maryland? The Fairfax Stone stands practically four-fifths of a mile within territory over which the State of West Virginia claims and has for a long time exercised jurisdiction and control and to which she denies that the domain of Maryland extends. The defendant cannot be heard thus to assert or attempt to maintain *uno flatu* two diametrically contrary and conflicting claims.

The call for the southern or right bank of the river cannot be gratified by adopting Fairfax Stone as the initial point through which the meridian is to be drawn, for the reason that the southern bank running from the said Stone, when the point designated Station 1 on the plat is reached, becomes its northern bank and thus defeats the call.

The only point located by either the plaintiff or defendant *for the first fountain of the Potomac River* is Potomac Spring, located by the plaintiff. *By this location, the call for the southern boundary of Maryland is entirely and completely gratified and fulfilled and the whole of the Potomac River, from its source to its mouth, is within the territory of the State of Maryland and forms the southern boundary of the Commonwealth. Lord Baltimore was entitled, under his charter, to go to the southern bank of the stream at the point where it flowed from the first fountain.* He was apparently aware that in construing grants from the Sovereign, the rule of the common law that grants shall be construed most strongly against the grantor is reversed from considerations of

public policy, and by the 22nd section of his charter he provided against this rule of construction as follows:

> "* * * and if peradventure hereafter it may happen that any doubt or question should arise concerning the true sense and meaning of any word, clause or sentence contained in this, our present charter, we will charge and do command *that interpretation to be applied always and in all things and in all our Courts and jurisdictions whatever to obtain which shall be judged to be more beneficial, profitable and favorable to the aforesaid Baron of Baltimore, his heirs and assigns.*"

It will be recalled by the Court that the *southern* boundary of Maryland has been fixed and determined *to be the southern shore or bank of the River from its source to its mouth* not only by arbitration and award under appropriate legislation of the States of Maryland and Virginia, so far as the same is conterminous with said States but also by the explicit decision of this Court and by the concurring decisions of other Courts and also by virtually all authentic writers upon the subject.

Morris vs. U. S., 174 U. S. 196.

Wharton vs. Wise, 153 U. S. 155.

Acts of 45th Congress, Third Session, Chapter 196, U. S. Statutes at Large, Vol. 20, pp. 481-482; see Appendix B.

Also the authorities cited heretofore on the true construction of the Maryland Grant.

5. If Fairfax Stone be taken as marking the first fountain through which the meridian of the western boundary of Maryland is to be drawn, said first fountain would be located outside the boundary of Maryland and thereby defeat the call of its Charter.

In support of this proposition, that if the Fairfax Stone is taken as the first fountain through which the meridian marking the western boundary of Maryland is to be drawn it would place the first fountain of the Potomac River outside the territory of Maryland and thereby defeat the call of its Charter, we respectfully submit that in order to gratify the call for both the *western* and *southern* boundaries of Maryland, such boundaries must be susceptible of location by actual survey thereof, *wholly and entirely within the territory of Maryland, and not beyond its limits.* To begin the location of the western boundary at Fairfax Stone, which then would also be the initial point of the southern boundary of the State, is to commence the survey at a point entirely outside of the territorial and jurisdictional limits of the State and wholly within the territory of West Virgina, and such location as a gratification of the call for either the western or southern boundaries of Maryland is simply impossible. All that has been said in support of the fourth proposition relative to the claim of West Virginia to exclusive jurisdiction, territory and control over the Potomac River west of the Fairfax meridian and against the right of Maryland over the river west of Fairfax meridian in location of her southern boundary, applies with equal force to the western boundary, as the Fairfax Stone bears the same relation to the western boundary as it does to the southern boundary of the State under the calls of the Charter of Lord Baltimore. It is thus seen that West Virginia in this case has urged two irreconcilable and contradictory propositions. For, upon the one hand, she has urged, in effect, that Fairfax Stone is a point in the western boundary of Maryland, and, upon the other, she contends that Maryland has no right to and over a substantial tract of territory in which this point in her boundary is located.

Potomac Spring the First Fountain of the Potomac River.

The first fountain of a stream is the point or source in which the water first comes to the surface.

Gould on Waters, sect. 41.
Farnham on Waters and Watercourses, sec. 501, page 1656.
30 Amer. & Eng. Ency. of Law, 351-2.
Doddridge vs. Thompson, 9 Wheaton, 469.
Handley's Lessee vs. Anthony, 5 Wheaton, 374.
Reynolds vs. McArthur, 2 Peters, 417
Howard vs. Ingersoll, 13 Howard, 415.
United States vs. Texas, 162 U. S., p. 1.
Uhl vs. Reynolds, 23 Ky. Law Rep. 759.
Dudden vs. Guardians of Poor, 1 H. and N. 627.
Wright vs. Howard, 1 Simon & Stuart, 203.
Colrick vs. Swinburne, 105 N. Y. 503.

"It is a river or water course from the point where the water comes to the surface and begins to flow in a channel until it mingles with the sea, the arms of the sea, lakes, etc."

Gould on Waters, sec. 41, page 98.

"Where a water course has its source in a spring, such a source is itself a part of the water course."

30 Am. & Eng. Encyclopedia of Law, *tit.* "Waters and Water Courses," sub-title, "Source," pages 351-2.
Dudden vs. Guardians of Poor, I H. & N. 627.

The general course of the Potomac River is admittedly southeast, and this being true, we lay it down as an axiom of common sense and a plain rule of reason that the foun-

tain rising farthest to the northwest from which the stream flows in the prevailing and general course of the river is and should be considered, taken and held to be its first fountain, and the stream flowing from it the main stream of the river. This conclusion thus derived from the important physical fact of the prevailing and general course of the Potomac River is warranted and sustained by the reasoning of this Honorable Court in the cases of Doddridge vs. Thompson, Handley's Lessee vs. Anthony, Reynolds vs. McArthur, and the second and final decision in United States vs. Texas, 162 U. S. 1, whereby the southern fork of the Red River was ascertained to be the stream referred to in the treaty between the United States and Spain and to be the boundary between the United States and the State of Texas.

See these authorities set out in full, *supra.*

It is absolutely undisputed in this case that Potomac Spring is the point at which the water first comes to the surface and begins to flow in a regular channel, and that Potomac Spring rises farthest to the northwest of all the waters of Potomac River.

Every physical, geographical and topographical feature of the region surrounding the head waters of the Potomac River unmistakably and unquestionably stamp Potomac Spring as the first fountain of the Potomac River, and a meridian line run through that Spring fully and precisely satisfies and strictly conforms to every call for the initial point in the western and southern boundaries of Maryland contained in its Charter.

(1) *Potomac River heading at Potomac Spring at once assumes a definite southeast course—the prevailing course of the river—with regular banks, while Fairfax Run runs directly opposite the course of the river, first flows nearly due west, thence northwest and thence northeast and east to the point of its confluence with the main body of the river shown at Station 31 on the plat.*

(2) *Potomac Spring is perennial in its flow, while the springs in the vicinity of Fairfax Stone are only wet weather springs, and have often been found entirely dry.*

The proof is virtually undisputed that Potomac Spring is a constant and never-failing fountain, while the springs at Fairfax Stone are simply wet-weather springs and often go entirely dry. In the testimony of W. McCulloh Brown, Surveyor on the part of the plaintiff, at page 994 of the Record, in response to a question as to the character of the springs found at Fairfax Stone, he replied:

> "Well, they are very weak, and on two occasions I have been unable to find any water in any of them, the water being some distance—well, it is northwest of the Fairfax Stone; I have seen them twice; I was there and found them perfectly dry, no water in them at all * * *."

And at page 996 of the Record the same witness says:

> "Q. What kind of spring did you find at Station 97 on the plat?
>
> "A. A very strong, good, cool spring.
>
> "Q. Is it or not the same character of spring that you found near the Fairfax Stone?
>
> "A. It is quite different from that near Fairfax Stone.
>
> "Q. In what respect is this spring different from that near the Fairfax Stone?
>
> "A. Well, different from the volume of water largely, and it was subsequently determined by its elevation and its nearness to the main watershed of the district."

Station 97 referred to by the witness and shown upon the plat marks the position of Potomac Spring.

George L. Mosser, at page 1106 of the Record, testified with regard to Potomac Spring as follows:

"Q. How long have you known that spring?

"A. I have known that spring to 1847.

"Q. Did you ever know that spring to go dry?

"A. I never did; I have taken many a drink at the spring before ever you came up.

"Q. How long have you known the spring at Fairfax Stone?

"A. I have known that—well, I couldn't say exactly, but long before Michler undertook to run that.

"Q. Have you ever known those springs to go dry?

"A. Yes, sir; they are dry now, I think, because they always go dry in the summer time when it is a little dry spell."

In the testimony of Richard T. Browning, found at page 1116 of the Record, the witness, being interrogated as to Potomac Spring, replied:

"We found the spring there a pretty good one, too."

This testimony stands uncontradicted upon the Record, and fully sustains the proposition that Potomac Spring is perennial in its flow and that the springs at Fairfax Stone are only wet-weather springs and frequently go dry.

(3) *The waters from Potomac Spring emanate and flow from the Atlantic Watershed and from a point within only 300 feet of the summit of Backbone Mountain, which is the acknowledged watershed of the Appalachian Range, separating the waters which flow into the Atlantic from those that flow into the Mississippi and the Gulf of Mexico. Fairfax Stone stands upon a foothill of the Backbone Mountain and at a much lower elevation than Potomac Spring. Potomac Spring issues out of the east side of Backbone Mountain at a point 277.3 feet from the top of the mountain at an elevation of 3,356 feet, one of the very highest points on the*

Atlantic Watershed in Maryland and West Virginia. (Page 975 of the Record.)

The Backbone Mountain is the acknowledged watershed of the Appalachian Range separating the eastern from the western waters, as will be seen from the Report of the Surveyor of the Plaintiff, pages 909-910 of the Record, the said Surveyor locating one of the fountain heads of Lead Mine Run, a tributary of the Cheat River, flowing in a westerly course, and for the purpose of illustrating the course thereof an actual survey of a portion of the stream was made, as appears from page 910 of the Record, above referred to. The watershed from which the Potomac River flows from Potomac Spring is readily traced throughout the entire Appalachian system, and the Great Savage or Backbone Mountain, although it may in different States assume or be locally known by other names, yet from New York to Georgia, from one end of the range to the other, it is readily traced, recognized and accepted as the Atlantic Watershed. By reference to the Report of the Surveyor on the part of the plaintiff, at pages 926 to 933, both inclusive, of the Record, it will be seen that as a result of the running of actual lines of levels, and by the use of the aneroid barometer, the actual elevation of different points at or about the head waters of Potomac River and of the Atlantic Watershed was ascertained and proved. Starting at Fairfax Summit, with an elevation of 3,066 feet above tide, and running thence to the first spring at Fairfax Stone, it was found that the elevation of this latter point was 3,162.416 feet, and by continuing said line of levels from the Fairfax Stone or Spring to Potomac Spring, it was ascertained that the latter was at an elevation of 3,287.12 feet above tide, or an actual difference in elevation in favor of Potomac Spring of 124.704 feet.

And by continuing this same line of levels it was ascertained that the head spring of Laurel Run was at an elevation of

3,228.69 feet; and as a result of a continuation of this line of levels it was found that the stake marked "October 24th," shown upon the plat at the spring of the "South prong of Potomac River," was at an elevation of 3,144.77 feet. It was further ascertained by continuing the same line of levels that the Potomac Meridian on the summit of the Backbone Mountain, 495.9 feet north of Potomac Spring, was 3,356.32 feet in elevation, or a difference in elevation of 192.92 feet in favor of Backbone Mountain over Fairfax Hill, upon which Fairfax Stone stands, as a watershed.

It was likewise determined by the same line of levels that bench mark No. 3 on "Arnold's Ridge" was at an elevation of 3103.9 feet.

It was further ascertained from readings of the aneroid barometer that the elevation of the Fairfax Meridian at Station "O" was 2709 feet or at an elevation of 453.4 feet less than the elevation of Fairfax Stone, proving conclusively the abrupt descent from the Fairfax Stone to Station "O" where the Fairfax Meridian crosses the main body of the river as before stated in this brief.

Fairfax Run heads upon Fairfax Hill, a foothill of the Backbone Mountain, and separated from the mountain by the Valley of the Potomac River, and this stream makes its way through a ravine starting at Fairfax Stone and continuing down to the forks of the river as shown at Station 31 upon the plat.

The general topography of the country, as described in the Record, further sustains the contention of the plaintiff. Going from Potomac Stone north to the summit of the Backbone Mountain, which is nearly and easily in view of Potomac Spring, the great stretch of territory along the meridian *north to the Mason and Dixon Line* is at once distinctly in view whilst going from Fairfax Stone along Fairfax Meridian it is first necessary to descend the abrupt side of and cross the valley of the Potomac to Station "O" and thence to

ascend the like abrupt steep of Arnold's Ridge and then again to descend into and cross the valley of Laurel Run another tributary of the Potomac and then again to ascend the precipitous sides of Backbone Mountain to reach the summit of the mountain at Backbone Station as shown upon the plat, a distance of practically three miles before the waters of the Potomac are left in the rear and the country stretching away to the Mason and Dixon Line becomes visible. Where the call is for the first source of the Potomac, any location whose meridian repeatedly crosses the waters of the Potomac at points east of where they begin to flow is in plain, clear and utter derogation of the call.

From all these cogent facts, the conclusion, it is submitted, is irresistib'e that Fairfax Stone does not stand at the first fountain of the Potomac River and a meridian drawn from it cannot be held to comply with or gratify the call for the western boundary of Maryland.

4. *Potomac Spring, by the undisputed testimony as ascertained by actual survey, is the westernmost source of the Potomac River, and a meridian drawn through it immediately crosses the crest of Backbone Mountain the Atlantic Watershed, at a point only 301.1 feet north of said Spring, and thus leaves to the east of it all the waters of the Potomac River.*

The fact that Potomac Spring is the most western source of the Potomac River was ascertained from an actual survey of said stream from the point shown at Station 31, on the plat, and thence with the course of said stream to Potomac Spring as designated upon the plat. In his testimony Mr. W. McCulloh Brown states that by actual survey he "found that the Potomac Spring was 7220.99 feet north of the Fairfax Stone and *5978.56 feet west of the Fairfax Stone or Fairfax Meridian,* they are one and the same thing, *and I found no other spring which was so far west.*" (Record, page 997.)

See also report of W. McCulloh Brown, surveyor on the part of the State of Maryland, pages 906 to 909 of the Record.

It will be observed by an inspection of the Record that Mr. Brown reports that he located to their head fountains all the tributaries of the Potomac River between the points shown at Station 31 on the plat and Potomac Spring and as above stated Potomac Spring rises farthest to the west of all the springs and fountains tributary to Potomac River and is in point of fact the westernmost source and first fountain of the Potomac River. The plats of both plaintiff and defendant are in accord with this statement and we respectfully submit that no attempt will be made to contradict in any respect this fact as ascertained by actual survey upon the ground.

(5) *Potomac Spring as the initial point of the first fountain of the Potomac River at once gratifies the call in the Charter of Maryland for both its western and southern boundaires.*

It will hardly be contended upon the part of the State of West Virginia in the light of the practically undisputed testimony in the Record in this case, that Potomac Spring is not in fact the first fountain of the Potomac River. The only ground upon which the defendant has sought to sustain its assertions that Fairfax Stone marks the head fountain of the Potomac is that it was so established by the Commissioners who fixed the limit of Lord Fairfax's grant. After having shown by the discussion under the aforegoing propositions that Potomac Spring, by reason of every physical feature of the surrounding country, is unmistakably marked as the first fountain of the Potomac River, it may be well to recur for a moment to the circumstances under which Fairfax Stone was selected by the Commissioners who laid out Lord Fairfax's grant as the first fountain of the Potomac River. It must, of course, always be borne in mind that at

that time no one admitted and it was not pretended that the State of Maryland was concluded by any determination of this question by those Commissioners. The call in the Grant which they were to locate and determine was a line between the first fountains of the Potomac and the Rappahannock Rivers. There is nothing in the Record to show that those Commissioners ever explored the Backbone Mountain or that they even knew of the existence of the spring known in this case as Potomac Spring. Furthermore, there is nothing to show that they knew that a line drawn north from Fairfax Stone would cross the main body of the Potomac River.

The glaring absurdity of selecting the Spring at Fairfax Stone as the first fountain of the Potomac, in the light of Lord Baltimore's Charter, was, in the absence of knowledge of these facts, not drawn to their attention. It was sufficient for those Commissioners that they could find a spring near the source of the Potomac River from which a line could be drawn to the source of the Rappahannock River, and include all of the territory of Lord Fairfax within a boundary marked by a line so drawn and the Potomac River. If the Charter of Maryland had been concerned in the question before the Commissioners, they would have seen that the fixing of Fairfax Stone as the first fountain of the Potomac, for the purpose of determining the western boundary of the State of Maryland, would have been in the teeth of the intention of the parties to that Charter. If the Charter of Lord Baltimore had been considered, it would have been seen that to fix Fairfax Stone as the point through which the meridian line marking the western boundary of Maryland was to be drawn, would entirely exclude and render nugatory the explicit call in the Charter for the first fountain of the Potomac. An inspection of the plats in this case showing the location of Fairfax Stone will disclose that to take Fairfax Stone as the point through which the meridian is to be drawn, would render meaningless the call in the Charter for the first fountain

of the Potomac. As such meridian crosses the main stream of the river itself at a point 4,020 feet north of Fairfax Stone, it will be seen that it is impossible to comply with the Charter and give any boundary whatever to the portion of territory in the neck of land formed by the bow or bend of the stream called Fairfax Run, from the point marking Fairfax Stone to Station O and the land at present thereto. Certainly, the first fountain of the Potomac River, according to the Charter, was intended itself to be a point in the boundary line of Maryland. This, as shown in this brief, has been the invariable construction of the Charter. It is inconceivable that the parties to that instrument ever imagined that the first fountain was entirely without the limits of the territory granted in that Charter. Yet, if Fairfax Stone prevails as marking the first fountain, a call in the Charter of Maryland, to which Maryland territory is to extend, is fixed at a point which is admitted to be beyond the limits of the territory granted. We most respectfully submit that it is perfectly clear, from a reading of the Charter, that the prevailing intention therein is that the *western limit* of Maryland territory was to embrace every point *from the first fountain of the Potomac River to the Pennsylvania line,* and that the *southern* boundary was to embrace *every point upon the farther bank of that river from its first fountain to its mouth.* In other words, all the territory between the points of the intersection of the meridian line with the Pennsylvania line, the first fountain of the Potomac and the mouth of the Potomac was intended to be included in Lord Baltimore's grant. The conditions, as they existed at the time the Charter was granted, make it perfectly clear that the first fountain itself was to be a point in the western and southern boundaries of the territory granted thereunder.

It should be remembered that at that time the country surrounding the upper waters of the Potomac was entirely unknown and unexplored. The general course of the river up-

ward from its mouth was known to be northwesterly. It will readily be seen, therefore, that it must have been thought at that time, from what the Charter discloses, that the first fountain would be found at a point within the general course of the river. *This obviously was the reason why the first fountain was designated in the Charter as the point through which the meridian marking the western boundary was to be drawn, for in that event a continuous southern boundary would be found from the fountain head to the mouth of the river; and a continuous western boundary would be found from the fountain head to the Pennsylvania line.* Upon any other hypothesis, it would have to be assumed that it was known at the time of the granting of the Charter that a meridian line through the farther fountain would cross the river itself, and that a part of the main body of the Potomac be west of the meridian, and also that the main body of the river would flow between the first fountain and the northern boundary, which, as shown above, is an assumption unwarranted by the facts. No one, of course, will contend in this case that at the time of the granting of the Charter to Lord Baltimore it was known to the parties thereto or to anybody that Fairfax Run made a bend, and that the spring at Fairfax Stone lay at a point east of where the river continued to flow. As the prevailing intention, therefore, was, as is thus clearly established from these facts, that all points upon the meridian between the first fountain of the Potomac and the Pennsylvania line should be in the western boundary of Maryland, we most respectfully contend that, apart from everything else, the Court must reject the contention that Fairfax Stone marked the first fountain, and must accept Potomac Spring as the true first fountain, as it is only by so determining that the prevailing and governing intention of the Charter can be gratified and fulfilled.

That the course of reasoning above pursued, which establishes the main stream and the first fountain or source of

the river from the cardinal and controlling facts of the most western longitude, the prevailing course, the volume, the width and the perennial supply of the stream itself, the elevation, water shed and general topography of the surrounding country and the relation of all these things to the definite and express calls in the Charter, and which in this case unerringly and unmistakably designate the North Fork and the Potomac Spring as the main branch and the first fountain, respectively, of the Potomac River,—this course of reasoning, we respectfully say, is the accustomed and established course employed by the Courts in determining questions of this sort, and has been repeatedly applied and approved by this Court and other Courts in dealing with this subject.

Doddridge vs. Thompson, 9 Wheaton, 469.
Handley's Lessee vs. Anthony, 5 Wheaton, 374.
Reynolds vs. McArthur, 2 Peters, 417.
Howard vs. Ingersoll, 13 Howard, 415.
United States vs. Texas, 162 U. S. 1.

In addition to the decisions of this Court last above cited, the case of Uhl vs. Reynolds, 23 Kentucky Law Reporter, 759 (s. c. 64 Southwestern Reporter, 498), is also directly in point. In that case the call in the patent under consideration was:

> "Beginning in Harlan County line on the top of Pine Mountain at the point of intersection of the Clay, Bell and Harlan County lines; thence with the Harlan County line north, etc."

The Court said:

> "It is conceded that the nearest point upon Pine Mountain is several miles distant from the intersection of the lines of Harlan, Clay and Bell Counties; and that to call for the top of Pine Mountain is misleading, unless, as is contended, Kentucky Ridge can be treated as a spur

of Pine Mountain. The point which is defined and fixed as the intersection of the three county lines is the *head of Big Run*. If this can be ascertained and determined, it seems to us that there can be no question that the starting point of the survey has been definitely ascertained. The testimony shows that Big Run heads in several hollows, which jut against Kentucky Ridge; that in the hollow which has its head in what is known as Foundation Gap, there is a large spring, which furnishes living water the year round; and that the water from this stream constitutes the main branch of Big Run. Dry Hollow, which also empties its waters into Big Run, is shown to be absolutely dry during the large part of the year. It, therefore, seems to us that the head of Big Run is the highest point on that stream which furnishes a continuous stream of water, and not necessarily its longest prong. In determining the head of a stream which has several branches, this Court has uniformly held that branch to be the main fork which furnishes the main volume of water."

The Court will also note that in the argument urged by West Virginia, through her distinguished spokesman, the late Charles J. Faulkner, against the establishment of the South Branch of the Potomac River as the main body of that stream, when the controversy was as between the North and South Branches, practically all the considerations which are now urged by Maryland as establishing the Northern Fork of the North Branch of the Potomac as its main stream were employed. Thus, at page 1296 of the Record, it appears that it was said on behalf of Virginia:

"What are the facts upon which Maryland would rely to show that any other stream than the one bearing the name is entitled to be regarded as the main branch of the Potomac? It were *idle* to say that the *South Branch*

is the Potomac, because the South Branch is a longer or even larger stream than the North Branch, which Virginia claims to hold by. According to that sort of reasoning, the Missouri, above its confluence with the Mississippi, is the Mississippi, being beyond comparison the longer and larger stream. The claim of the South Branch, then, would rest solely upon its great length. In opposition to this it might be said that the Cohongoroota is more frequently navigable, that it has a larger volume of water—that the valley of the South Branch is, in the grand scale of conformation, secondary to that of the Potomac—*that the South Branch has not the general direction of that river, which it joins nearly at right angles*—that the valley of the Potomac is wider than that of the South Branch, as is also the *river broader than the other.* And lastly that the course of the river and the direction of the valley are the same above and below the junction of the South Branch."

All these arguments, used by Virginia to repel the claim then made by Maryland that the *South* Branch was the main stream of the Potomac River, and to ascertain the North Branch as the main stream, now apply, with others, as indicated above, besides, to ascertain the North Fork of the North Branch as the main stream of the river as it flows from its source at Potomac Spring.

II.

MARYLAND IS STILL ENTITLED TO THE CALLS IN HER CHARTER FOR THE FIRST FOUNTAIN OF THE POTOMAC RIVER AND THE MERIDIAN THEREFROM TO THE NORTH, AND NO REASON IS SHOWN BY THIS RECORD WHY THIS COURT SHOULD DECLARE THAT SHE HAS FORFEITED THIS RIGHT.

In the aforegoing discussion we have, we respectfully submit, shown from the established facts in this case that Potomac Spring is the first fountain of the Potomac River as called for in the Charter of the Plaintiff. It now only remains to discuss whether there has been anything done by the State of Maryland which can be taken as a surrender of her right to go to the Potomac Spring, the first fountain of the Potomac River, according to her Charter.

The decree in this case will determine where the western boundary of Maryland is and will settle its location as by original right in the place decreed.

Rhode Island vs. Mass., 12 Peters, 657.

The western boundary of Maryland is a matter of fact, and, when ascertained, separates the territory of the State from the territory of West Virginia. Neither State can have any right beyond its territorial boundary.

It follows that when a place is within the boundary it is a part of the territory of the State; title, jurisdiction and sovereignty are inseparable incidents and remain so until the State makes some cession.

Rhode Island vs. Mass., 12 Peters, 733.

The locality of the western boundary line of Maryland being a matter of fact, its position upon the ground will be determined by the surveys which have been made in this case and by the claims and pretensions of the parties as they appear upon the plats returned by the Surveyor in accordance with the orders of the Court providing for the running of the same.

THE WESTERN LINES OF THE MILITARY LOTS—*The Alleged Deakins "Line."*

The only "line" the defendant has attempted to set up as a boundary between the two States, and the one which, in her

Answer, as found at page 66 of the Record, she maintains is the true boundary between the States, is the so-called Deakins "Line," and her allegations as to the establishment of said line are as follows:

> That the said Deakins Line "should be established as the true boundary line between the two States, and that she is entitled to all the territory lying west of said line. This line was run under the authority of the State of Maryland as a due North line. It was run by a competent and experienced surveyor, selected by said State, and doubtless the instruments used were the best obtainable then. The courses and distances of the Military Lots laid off by Deakins along the said line all call for this line as a due North line, as appears by the copies of said courses and distances filed herewith as above stated."

As will be hereinafter shown, both by the work of the surveyors and the testimony in the cause, these contentions of the State of West Virginia are absolutely without foundation in fact, and her whole and entire position upon this question is predicated upon an absolutely baseless assumption of what Francis Deakins did, and an erroneous conception of the authority under which he acted at the time of laying out the Military Lots for the State of Maryland. The State of Maryland denies that the Deakins Line is a true North line, and that the same was ever located as a true North line, and that the same was ever located from the Fairfax Stone, and that the same is even a continuous line between any termini, and that there is any evidence in this cause to show these alleged facts or any of them. The Deakins Line, as a boundary line, is a mere myth, and in point of fact never did exist even as a continuous line between its north and south ends, and far less as a boundary line marking the western boundary of the State of Maryland.

The Deakins Line never was authorized or recognized by the State of Maryland as a boundary, and there is absolutely no proof in this case tending to show that Francis Deakins laid out said line. The State has always expressly denied that it was a boundary.

Deakins was employed for a specific purpose, to wit: To lay out the manors, reserves and vacant lands in the State of Maryland lying to the westward of Fort Cumberland *as he might think fit and capable of being settled and improved* into lots of fifty acres each, which were to be allotted to the officers and soldiers of the Maryland Line for services in the War of the Revolution.

The State of Maryland, not being in a position to financially compensate her citizens who had rallied to and helped to maintain the great cause of Independence, determined that she would make some substantial acknowledgment, as best she could, of their valour and patriotism by giving that which she had at the time, her manors, reserves and confiscated lands capable then of being settled, to the westward of Fort Cumberland. The Resolution under which Deakins performed the services for which he had been engaged *plainly contradicts all suggestion of a boundary*—a fact to which the attention of the Court is especially called.

It will be observed by reference to the resolution of the General Assembly of Maryland under which the survey of the Military Lots was made, which resolution has been heretofore set out in this brief, that not only was no reference whatever made to the western boundary or any other boundary of the State of Maryland, but that the language employed is clearly contrary to the idea of establishing a boundary of the State. That resolution, which will be found at page 73 of the Record, simply says that the Governor and Council are requested

"to appoint and emply some skilful person to lay out the manor and *such part* of the reserves and back lands belonging to this State lying to the westward of Fort Cumberland, *as he may think fit and capable of being settled and improved.*"

Deakins had no authority to do any work other than that which he was specifically directed to do under the terms of the resolution under which he was employed. He was instructed *not* to lay out *all* of the manor and *not* to lay out *all* of the reserves and back lands which belonged to the State west of Fort Cumberland, but *only such part* of said lands as, in his judgment, might be *fit and capable of settlement and improvement.* This is the very opposite of authorizing the laying down of the extremity or boundary of the State. In point of fact, the Court will see upon an inspection of the copy of Deakins' map, as exhibited at page 362 of the Record, that a very large part of the territory lying westward of Fort Cumberland was not laid out into Military Lots by Deakins.

The Record in this case is absolutely silent, and the proof is entirely lacking that Francis Deakins ever undertook to construe the resolution under which he was employed to lay out said Military Lots, as conferring upon him any authority whatever to fix and determine the western boundary or any other boundary of the State of Maryland.

Upon the map of Francis Deakins, already referred to, which was filed with his report of the survey of the Military Lots, there appears a notation upon the margin of said map in the words following:

"The meridian line and head of the North branch of Potomac River *as fixed by Lord Fairfax.*"

Francis Deakins was thoroughly familiar with the location of the Fairfax Stone, and he was no doubt cognizant of the

fact that Lord Fairfax had planted said stone for the purpose of delimiting and fixing the boundaries of his grant, and Deakins was likewise aware of the fact that Fairfax had fixed this stone at what he claimed to be the head of the North branch of the Potomac River, and that a meridian drawn through the Fairfax Stone would run north to about where he made the western line of the most western tier of his Lots. And, in order to avoid any possible conflict of title between the soldiers to whom said Lots were to be allotted, and anyone who might claim title through the State of Virginia, he did not go farther west with the location of said Lots. Certainly, Francis Deakins, acting under the limited authority of the resolution before quoted, would not, for a moment, have undertaken to establish any boundary line between Maryland and Virginia ,when, as will be indicated hereafter, a universal understanding obtained in the State of Maryland that the Fairfax Stone did *not* mark the first fountain of the Potomac River, and that a meridian drawn through it did *not* constitute the western boundary of the State. This clear and general understanding found expression in the declaration of the Legislature the following year.

That Deakins himself knew the frame of mind of the Legislature of Maryland, and of the people of that State, with regard to the Fairfax Stone marking the first fountain of the Potomac River, is clearly evidenced by the guarded way in which he refers to the line fixed by Lord Fairfax to mark the boundary of his territory, and which Deakins shows upon his map as running along the western tier of the Military Lots laid out by him. It is inconceivable that Deakins should assume that any authority whatever had been conferred upon him to locate the western boundary of Maryland, and that the resolution, under which he was employed to lay out the Military Lots, conferred any such authority upon him. It must be assumed that Deakins was thoroughly familiar with the provisions of the First Constitution of Virginia, adopted

only eleven years before by the people of that State, wherein it was declared that:

> "The territories contained within the Charters erecting the Colonies of Maryland, Pennsylvania, North and South Carolina, are hereby ceded, released and forever confirmed to the people of those Colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever which might at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potomac and Pocomoke with the property of the Virginia shores or strands bordering on either of the said rivers and all improvements which have been or shall be made thereon." (Record, page 3.)

That the knowledge that Virginia had renounced all claim to any and all territory which she might theretofore have claimed within the boundaries of Maryland, and with the further knowledge that, at this very time, the State and the people of Maryland were claiming territory, jurisdiction and control to the head of the South branch of the Potomac River, and with the additional knowledge that the head of the South branch of the Potomac River was far to the west of the head of the North branch of the Potomac River as fixed by Lord Fairfax, and with the unmistakable language of the resolution of the Legislature of 1787 *limiting* and *guiding* him, it cannot, in the face of these facts, be contended that Francis Deakins would undertake to curtail, narrow down and lessen the territorial extent of his own State by making a meridian drawn through the Fairfax Stone the western *boundary* of the State.

At the risk of repetition of statement in this brief, we cannot help but refer *in extenso* to the resolutions passed by the First Constitutional Convention of Maryland in 1776, immediately after the recognition of the territorial rights of Mary-

land by the State of Virginia, wherein the State of Maryland, through its representatives in its Convention resolved as follows:

> "Resolved unanimously, that it is the opinion of this Convention that the State of Virginia hath not any right or title to any of the territory, bays, rivers or waters included in the Charter granted by his Majesty, Charles the First, to Cecilius Calvert, Baron of Baltimore.
>
> "Resolved unanimously, that it is the opinion of this Convention that the sole and exclusive jurisdiction over the territory, bays, rivers and waters included in the said Charter belongs to this State; and that the river Potowmack and almost the whole of the river Pocomoke, being comprehended in the said Charter, the sole and exclusive jurisdiction over the said river Potowmack, and also over such part of the river Pocomoke as is comprehended in the said Charter, belongs to this State."

These resolutions expressed the universally known attitude of the State of Maryland with regard to her claim of territory to the fountain head of the Potomac River, and which claim at the time extended to the head of the South branch of the Potomac River; and Francis Deakins doubtless knew, as every other citizen of the State of Maryland knew, that the claim of the State was to the first fountain head of the South branch of the Potomac River, and that a meridian drawn through the head of the South branch of the Potomac River was to mark her western boundary.

But whatever may have been the peculiar notions of Francis Deakins as to the effect upon the territorial limits of the State of Maryland, by the *ex parte* Act of Lord Fairfax in setting up the Fairfax Stone, and whatever deductions he may have drawn from this Act of Maryland's neighbor at the time, can avail nothing in the face of the immediate and ab-

solute repudiation as a boundary line of the lines to which he laid out the Military Lots by the Legislature of Maryland.

That Francis Deakins had laid out the Lots to an alleged line was only brought to the knowledge and attention of the Legislature of Maryland through the medium of his map, whereon a line was laid down.

It became necessary, in order that title might be derived from the State for the Military Lots which Deakins had laid out, that his map and report be adopted by the Legislature of Maryland, and that some method and means might be employed whereby the persons who were to be the beneficiaries of Deakins' work should secure title to the lots which might be awarded to them respectively. And so the Legislature of Maryland passed the Act of 1788, Chapter 44, but in so doing incorporated in said Act, as the fifteenth section thereof, an express, unqualified and complete repudiation of the alleged or apparent line to which Deakins had, of his own motion and without authority, either express or implied, laid out said Lots. This section of the Act is in the words following:

> *"And be it enacted, That the line to which the said Francis Deakins has laid out the said lots, is, in the opinion of the General Assembly, far within that which this State may rightly claim as its western boundary; and that, at a time of more leisure, the consideration of the Legislature ought to be drawn to the western boundaries of this State as objects of very great importance."* (Record, page 877.)

It is hard to conceive how the Legislature of Maryland could, in more pronounced terms and in language more explicit and direct, repudiate the Deakins Line as a boundary.

Location of the Military Lots.

The location of the Fairfax meridian which is an admittedly true North and South line, proves beyond controversy

or question, that the western lines of the most western tier of the Military Lots do not run in the same due North and South line because the western lines of these lots are not in the Fairfax Meridian; in other words, the western line of said lots is not a western line common to all of them, so that it is certain and obvious that the line to which said lots were laid out, cannot be considered and as a matter of absolute fact is not a compliance in any respect with the call of the Charter to Lord Baltimore for the meridian of the first fountain of the Potomac River.

At this point, it is well to call the attention of the Court to the statement in the Answer of the defendant already quoted, to the effect that the courses and distances of the Military Lots in the Deakins Line all called for said line as a due North line. And as a complete answer to this statement, we most respectfully refer the Court to the descriptions of said Military Lots as contained in the original certificates therefor, and exhibited at pages Nos. 366-372 of the Record. An inspection of said descriptions will show that in not a single solitary one of said lots is there any reference whatever made to the said Deakins Line as a due North line, or to said Deakins Line in any respect, and on the contrary such descriptions are absolutely silent as respects the said Deakins Line or any other line as a boundary to which their western lines may extend. Deakins neither mentioned nor suggested any such thing as a boundary of the State from one end of his report to the other.

The only reference in all the work of Francis Deakins to the Fairfax Stone is that contained in the description of Military Lot No. 1101, located upon the plat of the defendant in this cause, and which reference is as follows:

> "Beginning at a maple marked 1100, standing one mile north of a stone fixed by Lord Fairfax as the head of the North branch of the Potomac River."

We challenge the defendant to produce, in any of the work of Francis Deakins, any other reference to the Fairfax Stone than the one just mentioned. And we go farther and challenge the other side to produce from the report of Francis Deakins any reference whatever to a meridian line from the Fairfax Stone except the notation upon the margin of his plat of the meridian line and the head of the North branch of Potowmack River as fixed by Lord Fairfax.

None of the Military Lots in the western tier thereof depend upon or hang from the said Deakins Line or any other line having any relation to the said Deakins line for their location.

Take them lot by lot from the first to the last, and the truth of this statement will be verified. On the contrary, nearly if not quite all of said western tier of lots are bound to and depend for their beginnings upon the lines of the several grants made by the Lord Proprietary of Maryland in 1774 and subsequently confirmed by patents of the State of Maryland and which are located upon the plat of the plaintiff, to wit, the Royal Charlotte, Thomas and Ann, the Diadem, and Cherry Hill.

The State of Maryland, by actual survey and location of a number of these lots upon the ground, has proved beyond cavil or question that their most western limits are not in a single case in a meridian line running north from the Fairfax Stone; that their western limits are not even in a straight line in relation to each other, and these facts are admitted by the defendant in the testimony of her surveyor, Mr. Monroe. At page 1743 of the Record, he testified as follows:

> "295th Q. On page 199 of your testimony in chief you said that Military Lots numbers 2952, 2989, 2987, 2985, 2983, 2980 and 2981 are laid down different on your map from the way they are laid down on the Deakins map, and that on the tracing of the Deakins map their eastern boundary is on one straight line, *while on*

your map they are laid down showing offsets. Did you mean to say their eastern or western boundary on the Deakins map is in one straight line?

"A. I should have said that *the western boundary* was laid down in one straight line.

"296th Q. The *location of this block of lots when surveyed on the ground does not correspond with the tracing of the Deakins map which you have introduced, does it?*

"A. *It does not.*"

At pages 1745 and 1746 of the Record, he again testified:

"318th Q. You have stated that Marshall Fike pointed out to you lots numbers 2997 and 2998, and that you ran your reference line from the white oak at the corner of said lots south. *Did you find from that running that the western line of these lots was in the same north line with the other lots which you have located upon your map along the western lines of the lots?*

"A. *I did not.*"

In further support of the proposition that the western tier of said Military Lots does not depend upon or hang from said Deakins Line, it is in evidence that the plaintiff has located, by actual survey, the above-mentioned tracts of land, namely, the Royal Charlotte, the Thomas and Ann, the Diadem and Cherry Hill. These tracts of land were all located by actual survey upon the ground in accordance with the courses, distances and calls contained in the original patents therefor. See Plates ~~5, 6, 7, 10~~. 2,3,4,7.

Military Lots Nos. 316 and 317, located by the State of Maryland, depend for their true position and correct location upon the ground upon the third line of the said tract called "Royal Charlotte."

Military Lot No. 316 calls to begin at the end of 122 perches on the third and last line of a tract of land called the "Royal Charlotte," and running with said third line south 26 degrees, west 202 perches, thence north 180 perches, and then by a straight line to the beginning. (Record, page 366.)

Military Lot No. 317 calls to begin at the beginning of Lot No. 316 and to run with the third line of Royal Charlotte reversed, north 26 degrees, east 80 perches, west 122 perches, south 70 perches, and then by a straight line to the beginning. Here the second line of Lot No. 316 and the third line of Lot No. 317 define the westernmost limits of this line of lots, but there is no call to meridian or other line of any description.

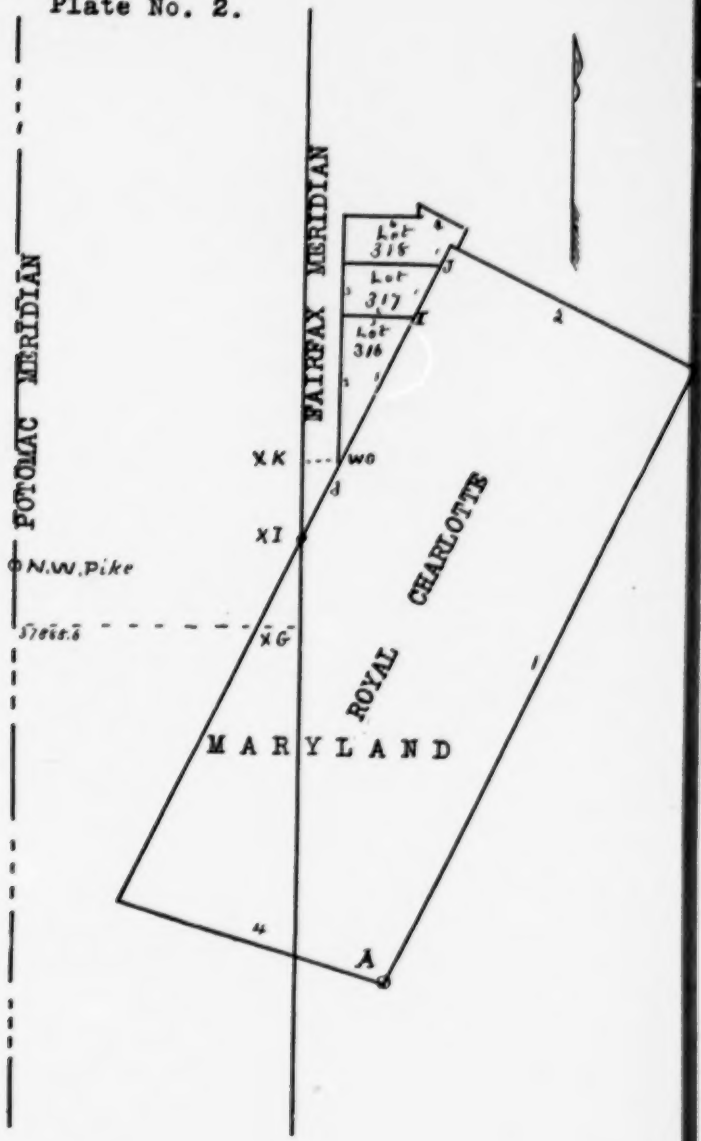
Military Lot No. 1237 calls to begin at the end of 327 perches on the third line of the tract of land called "Thomas and Ann" surveyed for Thomas Johnson, Esquire, and running south 28 degrees, west 204 perches, north 182 perches, then by a straight line to the beginning.

Military Lot No. 1238 calls to begin at the end of the second line of Lot 1237 and running north 80 perches, east 100 perches, south 80 perches, then by a straight line to the beginning.

Military Lot No. 1239 calls to begin at the end of the first line of Lot 1238 and running north 80 perches, east 100 perches, south 80 perches, then by a straight line to the beginning.

It will be observed that this block of lots depend, for their true location, upon the third line of said tract of land called "Thomas and Ann," and that nowhere in the description of any of said lots is any reference or call made to the said Deakins Line or any other line running north from the Fairfax Stone, and this location, made in accordance with the original certificates for said Military Lots, is *in flat contradiction* of the statement contained in the Answer of the defendant already referred to, that "the courses and distances

Plate No. 2.


POTOMAC MERIDIAN
FAIRFAX MERIDIAN
Lot 315
Lot 317
Lot 316
XK
wo
XI
N.W. Pike
XG
ROYAL CHARLOTTE
MARYLAND
A

of the Military Lots laid off by Deakins in the said line, all call *for this line as a due North line.*"

Military Lot No. 1447, located by actual survey and appearing upon the plat of the plaintiff, calls to begin at the end of the second line of a tract of land called the "Diadem," also located by actual survey, and appearing upon the plat of the plaintiff, and runs thence north 9 degrees, east 30 perches, south 69 degrees, east 40 perches, north 110 perches, west 100 perches, south 95 perches to the third line of the "Diadem" and with it reversed to the beginning.

Military Lot No. 1448 calls to begin at a bounded chestnut marked 5118, standing at the end of the fourth line of Lot 1447 and running north 80 perches, east 100 perches, south 80 perches, then by a straight line to the beginning.

Military Lot No. 1463 calls to begin at the bounded tree of Lot No. 1448, and running west 146 perches, south 20 perches, east 10 perches, south 61 degrees, east 154 perches, then by a straight line to the beginning.

It will thus be seen that this last above mentioned block of lots depends upon and hangs from the end of the second line of the tract of land called the "Diadem" *and do not refer to said Deakins Line or any other line running north from Fairfax Stone as fixing and delimiting the western boundary of any of said lots.*

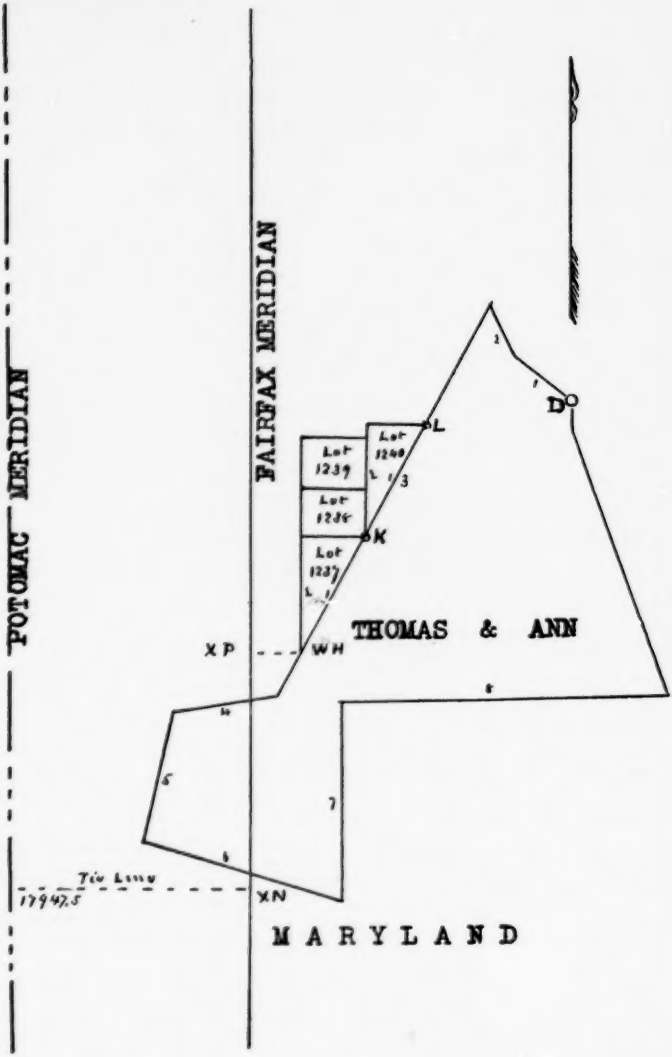
It is further shown by the testimony of Mr. Brown, surveyor for the plaintiff, that this entire block of lots, including Lot No. 1463, laid down by protraction, for illustration, hangs from Military Lot No. 1447, which was located by actual survey as above shown, and that therefore Military Lot No. 1462, being a lot in the most western tier of said Military Lots is correctly located upon the plat of the plaintiff and *nowhere in the description of said lot is any reference made to the said Deakins Line or to any other line running north from the Fairfax Stone, as bounding upon and marking the western limits of said lot.* (See Record, pages 1015 and 1016.)

Military Lot No. 2952 calls to begin at the end of 34 perches on the first line of the tract of land calleed "Cherry Hill" granted to William Deakins, Jr., and running thence south 117 perches, east 80 perches, north 78 perches to the second line of Cherry Hill, then north 30 degrees, west 34 degrees, and then by a straight line to the beginning. This lot was located by actual survey upon the ground, according to its call for the end of 34 perches on the first line on the tract of land called "Cherry Hill," which was also located by actual survey upon the ground, according to the courses, distances and call as contained in the original patent for said tract of land, and the same appear in their true relation to each other upon the plat of the plaintiff in this cause. It will thus be seen that said Lot No. 2952, *which is a lot in the westernmost tier of Military Lots as laid out by Francis Deakins does not call nor depend for its location upon the said Deakins Line or any other line running north from the Fairfax Stone, but its position upon the ground is fixed and determined by the true location of the aforesaid tract of land called "Cherry Hill."*

In the face of these results obtained from actual survey, we respectfully submit to this Honorable Court that it is impossible to accept the untenable and mistaken allegation in the Answer of the defendant that the courses and distances of the Military Lots laid off by Deakins along the said line all call for this line as a due North line, or the equally incorrect and unwarranted statement contained in said Answer that this fact appears by the copies of said courses and distances filed with the same.

All meridian or true North lines starting at Fairfax Stone and running thence to the Mason and Dixon line coincide with each other at all points between their termini, and any line between said points that does not coincide with Fairfax meridian is not a true North or meridian line. This proposition, we submit, is absolutely correct upon the plainest mathematical principles, but it must be borne in mind by

Plate No. 3.


POTOMAC MERIDIAN
FAIRFAX MERIDIAN
Lot 1239
Lot 1238
Lot 1237
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K
D
XP
WH
THOMAS & ANN
XN
MARYLAND

this Honorable Court that when we speak of the Fairfax meridian we mean the Fairfax meridian as delineated upon the plat of the plaintiff and which there appears as a reproduction of the meridian line located by Lieutenant Michler in 1859, and *the same is not to be confounded with any supposed meridian alleged to have been run by Francis Deakins or by Lord Fairfax at the time of setting up the Fairfax Stone.* In point of fact, so far as is known, neither Deakins nor Lord Fairfax ran any such meridian.

Having located, by actual survey upon the ground, the above mentioned tracts of land and Military Lots, and having reproduced the Fairfax or Michler meridian as established in 1859, we now proceed to show by accurate measurements and proof the relation of the westernmost lines of said Military Lots to the Fairfax meridian and their relation to each other and their distance east from said meridian.

These measurements and proofs indubitably establish that the western boundaries of the lots in question do *not* constitute a single or continuous line and also that their respective western boundaries are, at various distances, east of the Fairfax meridian.

Taking up first the proposition that the western lines of these lots are at divers distances east of the Fairfax meridian, the Record exhibits that lots 316 and 317 are by actual measurement 952.8 feet east of the said meridian (Record, pages 958-959). And also that lots 1237 and 1238 are 1176.1 feet east of the Fairfax meridian (Record, page 960). And also that lots 1463 and 1462 are 2721.2 feet east of the said meridian (Record, page 962). And also that lot 2952 is 3623.3 east of said meridian (Record, page 963). The summary being as follows:

Lots 316 and 317,	East 952.8 feet.
" 1237 and 1238,	" 1176.1 "
" 1463 and 1462,	" 2721.2 "
" 2952	" 3623.3 "

An inspection of this table of distances and the map of the plaintiff will disclose the fact that these lots, as we proceed north, continually diverge from the Fairfax meridian and in their location are at irregular and constantly increasing distances to the east from said meridian, and accordingly it is perfectly plain that they are not in a meridian line.

But we go farther and say, as we have stated in the premises, that their westernmost lines are not only not in a meridian line, but that the points in their boundaries located by the plaintiff in this cause by actual survey are not in one and the same straight line in their relation to each other.

If their westernmost lines were in one and the same straight line the relative distance east of the meridian of Fairfax Stone of each point determined would be in proportion to its distance north of the stone, and these several perpendicular distances would be parts of similar triangles with a common angle at Fairfax Stone. That the perpendicular distances obtained by actual measurement are not proportional is shown from the following table worked out from the common rule of proportion, where the sides and angles found by our measurements from Military Lot 316 (the southernmost lot upon our map), are taken as the basis of comparison for the remaining lots to the north. In the table the first column represents the numbers of the Military Lots; the second the latitude or distance north from Fairfax Stone, the third column the distance of the point in the lot determined, as actually measured east from the Fairfax Meridian[1], and the last column the perpendicular

[1] See Record, pages 958 to 963. See Record, page 978 for explanation of Latitude and Departure from Potomac Spring, and the method of record on this survey. See, also, Record, page 909, where the latitude of the Potomac Spring is found to be 7220.99 feet north of, and the departure 5978.56 feet west of the Fairfax Stone. Note that where in the returns references are made to points, where their latitude and departure merely are given, this refers to their position in relation to Potomac Spring and the Potomac Meridian. If it is desired to compare them with the Fairfax Stone, or the Fairfax Meridian, the latitude given above must be added, and the departure subtracted.

Plate No. 4.

MARYLAND
WEST VIRGINIA
POTOMAC MERIDIAN
FAIRFAX MERIDIAN
Lot 1451
Lot 1450
Lot 1449
Lot 1448
Lot 1463
Lot 1447
Lot 1462
XS
Y
WK
M
DIADEM
XR
D
Q
E
1239291

distance as calculated east of the Fairfax Meridian, which the western boundaries of the several lots *must have* in order to be in one and the same straight line.

TABLE.[2]

No. of Lot.	Distance north of Fairfax Stone obtained by actual measurement.	Perpendicular distance east of the Fairfax Meridian as obtained by actual measurement on the ground.	Perpendicular distance east of the Fairfax Meridian, which the western line of each lot, respectively, must have, in order to be in one and the same straight line as obtained by calculation.	
316	49,496.99 feet	952.8 feet	952.8 feet	A
1237	91,069.99 "	1,176.1 "	1,731.1 "	B
1463	136,657.00 "	2,721.2 "	2,630.6 "	C
2952	167,129.29 "	3,623.3 "	3,217.2 "	D

[2] The proportions from which the fourth and last column of figures are obtained, are as follows, using Lot 316 as the basis of comparison:

Lot 316 N.	Lot 1237 N.	Lot 316 E.	Lot 1237 E
B 49,496.99	91,069.99	952.8	1,753.1 ft.
Lot 316 N.	Lot 1463 N.	Lot 316 E.	Lot 1463 E.
C 49,496.99	1,366.57	952. 8	2,630.6 ft.
Lot 316 N.	Lot 2952 N.	Lot 316 E.	Lot 2952 E.
D 49,496.99	167,129.29	952.8	3,217.2 ft.

If it is desired to find the tangent of the angle, and the angle, which a line drawn from the western boundary of Lot 316 to Fairfax Stone, makes with the Fairfax Meridian (as we are dealing with right angle triangles), we have the following formula:

$$\frac{c}{b} = \text{tangent } x$$

in which c = the perpendicular distance east from the Fairfax Meridian, and b = the distance of this perpendicular north of the Fairfax Stone. Substituting now our figures obtained by measurement, as given above in preceding tables,

$$\frac{953.8}{49,496.99} = .01925 \text{ which is the natural tangent}$$

of the angle at Fairfax Stone. The angle obtained from the tangent .01925 is found by inspection of Troutwine's or any other standard engineer's tables to be 1° 06′ 10″

It is thus demonstrated by measurements upon the ground and by figures resulting from mathematical calculation that the western lines or boundaries of these several Military Lots are not and cannot be in a straight line. According to this result, corroborated by inspection of the map of the plaintiff and by inspection of Plate No. 9, on which plate the broken line drawn from the Fairfax Stone appears, it is plain and clear that the western boundaries of these lots, *not* being in any straight line, cannot be taken or held to be a boundary line as claimed by the defendant.

MARYLAND GRANTS AND PATENTS WEST OF THE ALLEGED DEAKINS "LINE."

That neither the Lord Proprietary nor the State of Maryland, as his successor entitled to the land contained within the boundaries of the Charter, recognized any lines as fixing the western limit of Maryland, is entirely apparent when we consider the several grants of land located in 1774 under warrants issued out of the Proprietary's land office.

In the case of Howard vs. Moale, 2 H. and J. Rep., page 249, the Court of Appeals of Maryland said:

> "The Lord Proprietary held the dominion of Maryland and property of the soil which he could sell and dispose of in the same manner as any other person, and subject to the same beneficiary, legal and equitable rights, as in the hands of any other person."

These tracts of land were located by actual survey upon the ground by the plaintiff and are shown upon its plat and were patented by the State of Maryland. These several tracts, so located, appear on the several plates inserted in this Brief, numbered respectively ~~5, 6, 7, 9~~ 2, 3, 4, 6 and ~~10.~~ 7. These tracts are as follows:

POOR CO

Plate No. 6.

ED
EC
EB
EE
EA
FAIRFAX MERIDIAN
MONROE LINE
ELDER SPRING
MARYLAND
31 M.
30 M.
XT
WU
XV
WV
KM
F
W.D
Gun
MILITARY LOTS
2987
2985
2983
2980
2981

"The tract called ELDER SPRING, which appears on Plate 16 was patented by Maryland on the 15the day of February, 1786, a copy of which patent, exhibited at page 724 of the Record, reads as follows:

"FRANCIS DEAKINS, HIS PATENT, 'ELDER SPRING,'
411 ACRES.

"*The State of Maryland, etc.:*

"Know Ye that Whereas William Deakins, Junior, on the twenty sixth day of April, seventeen hundred and seventy four, had surveyed for him a tract of land called 'Elder Spring,' lying then in the County of Frederick now in Washington County, and containing four hundred and eleven acres, by virtue of so much part of a warrant for Eighteen hundred and eighteen acres granted him out of the Proprietarys Land Office the twenty sixth day of March, seventeen hundred and seventy four, according to the Conditions of Plantation then in force as appears—

"That the said William Deakins, Junior, by an assignment dated the twenty-sixth day of August, seventeen hundred and eighty one made over unto Francis Deakins and his heirs the Certificate of the aforesaid tract of land, and the right of the proprietary being now vested in the State of Maryland—

"The said State doth hereby Grant unto him the said Francis Deakins all that the aforesaid tract or parcel of land called 'Elder Spring,' lying in Washington County—

"Beginning in the centre between two bounded Trees a white oak, and a Black gum standing on a draught of Buffelow Run about fifty perches West, from the Main Run and about two hundred yards from a Spring that breaks out of a ridge which divides the waters of Sandy

Creek and Buffelow Run, about eight or nine miles southwardly of Jacob Froman's Mill, and running thence North, six degrees East, one hundred and forty six perches; North, twenty degrees West, eighty perches; North, seven degrees East, one hundred and seventy three perches West, one hundred perches; South, sixty seven degrees West, sixty perches; South, twenty five degrees West, eighty perches; South, thirty two degrees East, forty perches; South, forty eight degrees East, ninety eight perches; South, twenty perches; South, thirty eight degrees West, eighty two perches; South, eight degrees West, thirty perches; South, forty two degrees East, forty perches; South, ten degrees West, one hundred and forty seven perches; South, fifty one degrees East, fifty six perches; North, seventy seven degrees East, eighty perches; North, forty one degrees East, forty perches; then with a straight line to the beginning—

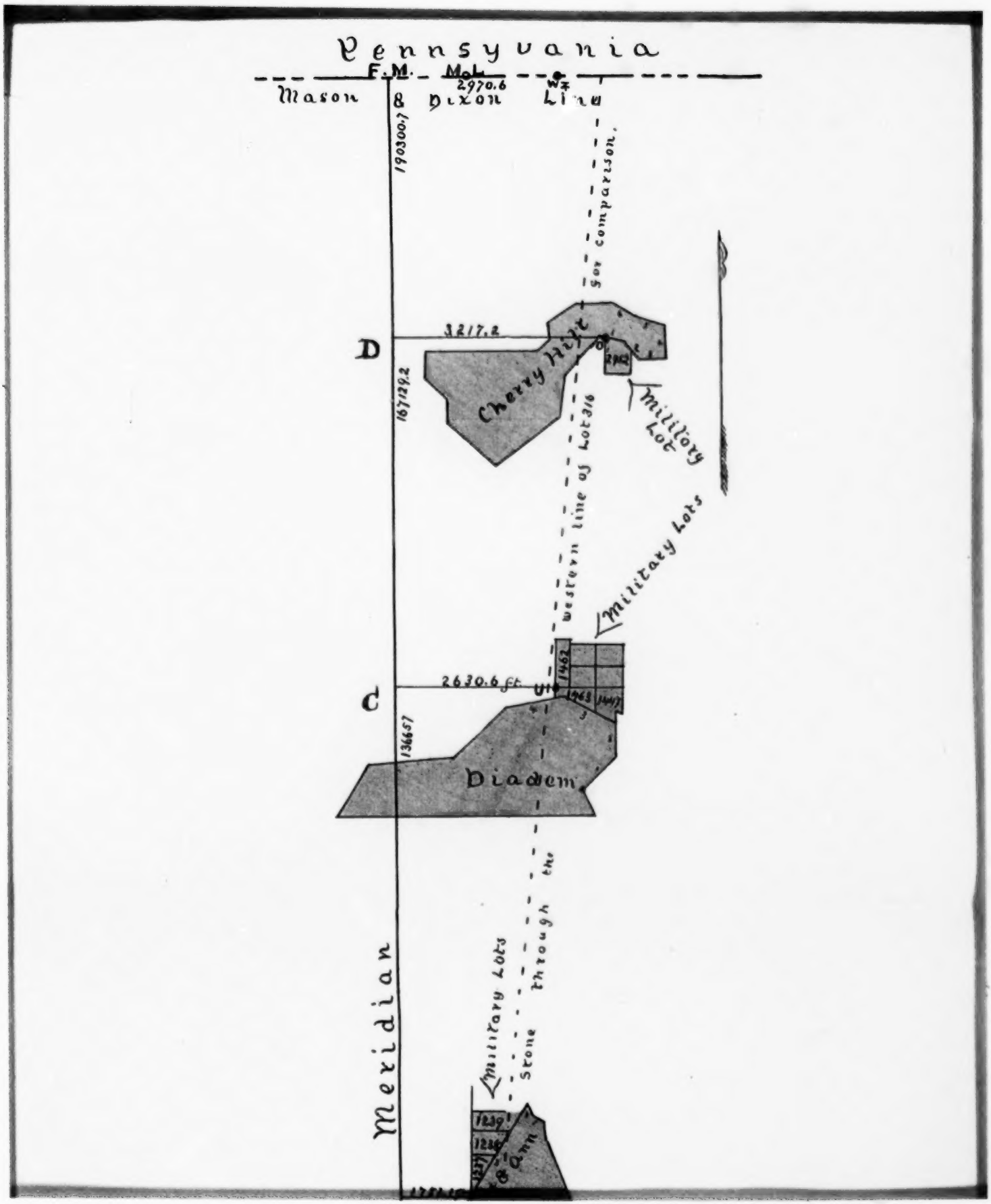
"Containing four hundred and eleven acres, according to the Certificate of Survey thereof, taken and returned into the Land Office bearing date the twenty sixth day of April, seventeen hundred and seventy four, and there remaining; together with all rights, profits, benefits and privileges thereunto belonging. To Have and to Hold the same unto him the said Francis Deakins his heirs and assigns forever—

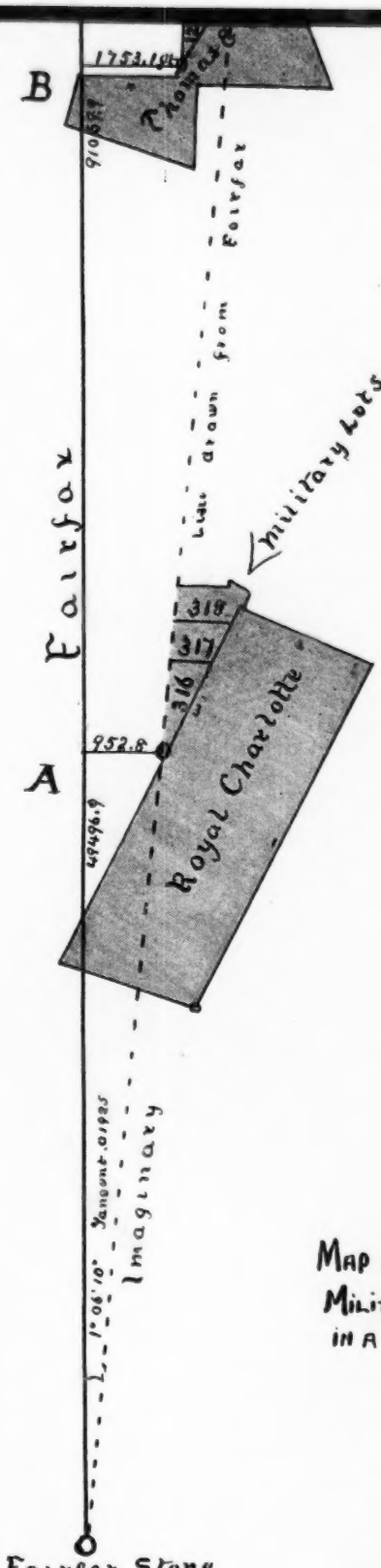
"Given under the Great Seal of the State of Maryland this fifteenth day of February, seventeen hundred and eighty six—

"Witness the Honorable John Rogers, Esquire, Chancellor.

"W. SMALLWOOD. ROGERS, Chan'r."

(The Great Seal.)


Pennsylvania
F.M.
Mon.
2970.6
Mason & Dixon Line
190300.7
for comparison.
3217.8
D
Cherry Hill
Military Lot
167292
Western line of Lot 316
Military Lots
2630.6 ft.
C
136657
Diadem
Meridian
Military Lots
Stone through the
Dam



MAP SHOWING THAT THE MILITARY LOTS ARE NOT IN A STRAIGHT LINE.

Plate No. 9

Horizontal Scale 2000 feet
Vertical Scale 10 000 feet

This tract of Elder Spring *extends, as shown by the survery and plate, far west of the Fairfax Meridian and, of course, for a still greater distance west of the Deakins "Line."*

The tract of called Cherry Hill which appears on Plate 7, was also patented on the 15th day of February, 1786, and a copy thereof, exhibited at page 788 of the Record, reads as follows:

"William Deakins, Junior, His Patent, 'Cherry Hill,' 384 Acres.

"*The State of Maryland, etc.:*

"Know Ye that Whereas Brooke Beall on the twenty fifth day of April seventeen hundred and seventy four had surveyed for him a tract of land called 'Cherry Hill,' lying then in Frederick County, now in Washington, and containing three hundred and eighty four acres, by virtue of so much part of a warrant for four hundred and thirty four acres and one half acre, granted him out of the Proprietary's Land Office the thirtieth day of March seventeen hundred and seventy four, according to the Conditions of Plantation then in force as appears—That the said Brooke Beall by an assignment dated the twenty fourth day of August, seventeen hundred and seventy four made over unto William Deakins, Junior, and his heirs, all his right, title, property, claim and demand of in and to the Certificate of the aforesaid tract of land, and desired that Patent might issue in his name for the same, and the right of the Proprietary being now vested in the State of Maryland—

"The said State doth hereby Grant unto him the said William Deakins Junior all that the aforesaid Tract or parcel of land called 'Cherry Hill,' lying in Washington County—

"Beginning in the Centre between three bounded Trees, a locust, a White Oak and an Ash standing on a rising about one mile Westwardly of Bufflelow Run and about five or six miles South West-wardly of Jacob Froman's Mill, and running thence South, eighty degrees East, one hundred perches; South, thirty degrees East, sixty perches; East, seventy three perches; North, sixty eight perches; North, sixty eight degrees West, one hundred and seventy six perches; South, eighty degrees West, one hundred perches; South, fifty three degrees West, seventy two perches; South, four degrees West, twenty eight perches; South, forty six degrees West, fifty four perches; West, one hundred and twenty perches; South, twelve degrees West, eighty six perches; South, sixty seven degrees East, sixty perches; South, fifty perches; South, twenty nine degrees East, sixty four perches; North, seventy one degrees East, one hundred perches; North, sixteen degrees East, one hundred and thirty four perches, then with a straight line to the beginning—

"Containing three hundred and eighty-four acres, according to the Certificate of Survey thereof taken and returned into the Land Office bearing date the twenty-fifth day of April, seventeen hundred and seventy-four and there remaining, Together with all rights, profits, benefits and privileges thereunto belonging: To Have and to Hold the same unto him the said William Deakins Junior his heirs and assigns forever—

"Given under the Great Seal of the State of Maryland, this fifteenth day of February, seventeen hundred and eighty-six—

"Witness the Honorable John Rogers Esquire Chancellor—

"W. SMALLWOOD. ROGERS, Chan'r."

(The Great Seal.)

Plate No. 7.

WEST VIRGINIA
POTOMAC MERIDIAN
FAIRFAX MERIDIAN
MARYLAND
CHERRY HILL
Lot 1 2952 3
159271.8

This tract of CHERRY HILL *also extends, as shown by the Survey and Plat, far west of the Fairfax Meridian, and of course, for a still greater distance, west of the alleged Deakins "line."*

The tract of land called NON PAREIL which was patented on the 29th day of September, 1786, and found at page 798 of the Record, reads as follows:

"JAMES WIGNELL, HIS PATENT, 'NON PAREIL,' 2482 ACRES.

"*The State of Maryland, &c.:*

"Know Ye that Whereas Jonathan Boucher on the fifth day of September, seventeen hundred and seventy-four, had surveyed for him a tract or parcel of land called 'Non Pareil,' lying then in Frederick now in Washington County and containing two thousand four hundred and eighty-two acres, by virtue of eighteen hundred and sixty two acres, part of a Common Warrant for two thousand acres dated the twenty sixth day of March seventeen hundred and seventy four, and fifty acres part of a Special Warrant for four thousand acres dated the twenty fifth day of the month and year last aforesaid, both granted out of the Proprietary's Land Office, according to the conditions of Plantation then in force as appears:

"That the said Jonathan Boucher by an assignment dated the tenth day of March seventeen hundred and seventy five, made over all his right title and interest of in and to the Certificate of the aforesaid Land unto William Hayward, who in like manner by an assignment dated the twenty seventh day of October seventeen hundred and seventy eight, made over all his right, title and interest of in and to the Certificate of the said Land unto James Clark of Baltimore County—

"That the said James Clark, pursuant to Act of Assembly, paid to the Treasurer of the Western Shore, the sum of forty seven pounds ten shillings current money Caution for the quantity in the above Survey over and above the Warrant, and afterwards, to wit, on the twenty seventh day of September seventeen hundred and eighty six, made an assignment of all his right and title to the said Land unto James Wignell of Baltimore Town, and the right of the Proprietary being now vested in The State of Maryland,

"The said State Doth hereby Grant unto him the said James Wignell all that the aforesaid tract or parcel of Land called 'Non Pariel,' lying in Washington County—

"Beginning at three bounded Hickory Trees, standing on the West side of a Hill, sixteen perches and one-quarter of a perch on the East side of the old road that leads from the Dunkard Glades to the Dunkard Bottom, the above Trees standing about forty perches from a meadow, known by the name of Snows Glade, about two or three miles from Murleys Glades, and running thence North, one hundred and fourteen perches; North, sixty degrees East, one hundred and twenty perches; North, forty five degrees East, twenty four perches; North, twelve degrees East, one hundred and ten perches; North, one hundred and forty eight perches; North, sixty degrees East, one hundred and fourteen perches; North, sixty one perches; North, thirty degrees West, fifty perches; North, thirty degrees East, sixty-five perches; North, twenty degrees West, two hundred and forty one perches; South, fifty degrees West, thirty five perches; West, one hundred and seventy six perches; South, fifty seven degrees West, fifty perches; South, twenty five degrees West, seventy eight perches; South, seventy five degrees West, fifty four perches; South, five degrees West, forty five perches; South, two degrees

West, sixty six perches; South, one hundred and seventy-two perches; South, twenty four degrees West, one hundred and ninety-two perches; South, thirty five degrees West, twenty perches; South, thirty degrees East, one hundred and twenty perches; South, five degrees West, forty three perches; South, fifteen degrees East, one hundred and seventy perches; South, fifty degrees West, forty seven perches; South, thirty degrees East, forty four perches; South, twenty degrees West, eighty perches; South, forty perches; South, sixty four degrees east, forty perches; South, forty six degrees East, one hundred and twenty perches; South, forty degrees West, eighty perches; South, nineteen degrees West, one hundred and sixty perches; North, sixty three degrees East, one hundred and sixty perches; North, eighty five degrees East, ninety one perches; North, forty perches; North, thirty degrees East, thirty six perches; North, eighty degrees East, ninety perches; then with a straight line to the beginning.

"Containing two thousand four hundred and eighty two acres, according to the Certificate of Survey thereof, taken and returned into the Land Office bearing date the fifth day of September, seventeen hundred and seventy four, and there remaining; Together with all rights, profits, benefits and privileges thereunto belonging To Have and To Hold the same unto him the said James Wignell his heirs and assigns forever—

"Given under the Great Seal of the State of Maryland, this twenty ninth day of September, seventeen hundred and eighty six—

"Witness the Honorable John Rogers, Esquire, Chancellor.

"W. SMALLWOOD. J. ROGERS, Chan'r."

(The Great Seal)

This tract of NON PAREIL *also extends west of both the Potomac and the Fairfax Meridians and, of course, for a still greater distance west of the so-called Deakins "line."*

The tract called THOMAS AND ANN, which is shown on Plate 13 and which was patented on the 6th day of December, 1786, and exhibited at page 686 of the Record, reads as follows:

"THOMAS JOHNSON, ESQUIRE, HIS PATENT, 'THOMAS AND ANN,' 2000 ACRES.

"*The State of Maryland:*

"Know Ye that Whereas Thomas Johnson Esquire of Frederick County (late Thomas Johnson Junior Esquire of the City of Annapolis) had surveyed for him a tract or parcel of land called 'Thomas and Ann,' lying then in Frederick, now in Washington County containing two thousand acres, by virtue of a Special Warrant for that quantity granted him out of the Proprietary's Land Office, the twenty fifth day of March seventeen hundred and seventy four, according to the Conditions of Plantation then in force as appears: and the right of the Proprietary being now vested in the State of Maryland.

"The said State doth hereby Grant unto him the said Thomas Johnson, Esquire, all that the aforesaid tract or parcel of land called 'Thomas and Ann,' lying in Washington County.

"Beginning at four bounded white oaks standing on the West side of McCullock's Road in a large glade commonly called and known by the name of Murley's Glade, which said white oaks stand about North, thirty three and a half degrees West, one thousand and ninety five perches from the mouth of the Little Youghyougany, it being the beginning of Lord Baltimore's Manor on the

great glades containing seventeen thousand seven hundred and fifty acres, and running thence North, eighty five degrees West, one hundred and twenty perches; North, twenty seven degrees West, eighty five perches; South, twenty eight degrees West, six hundred and one perches; South, eighty two degrees West, one hundred and sixty nine perches; South, twelve and a half degrees West, two hundred and seventeen perches; South, seventy six degrees East, three hundred and twenty perches; North, three hundred and two perches; East, four hundred and eighty perches; North, eighteen and a half degrees East, four hundred and forty seven perches, then a straight line to the beginning.

"Containing and now laid out for two thousand acres, according to the Certificate of Survey thereof taken and returned into the Land Office bearing date the ninth day of April seventeen hundred and seventy four, and there remaining: Together with all rights, profits, benefits and privileges thereunto belonging To Have and To Hold the same unto him the said Thomas Johnson, Esquire, his heirs and assigns forever.

"Given under the Great Seal of the State of Maryland, this sixth day of December seventeen hundred and eighty six.

"Witness the Honorable John Rogers, Esq., Chancellor.

"W. SMALLWOOD. J. ROGERS, Chan'r."

(The Great Seal)

This tract of THOMAS AND ANN *also extends, as shown by the Survey and Plat, west of the Fairfax Meridian and, of course, for a still greater extent, west of the Deakins "line."*

The tract called THE ROYAL CHARLOTTE which appears on Plate $\frac{2}{A}$ and which was patented on the 14th day of May,

1787, and exhibited at page 660 of the Record, reads as follows:

"THOMAS HALL, HIS PATENT, 'THE ROYAL CHARLOTTE,' 2000 ACRES.

"The State of Maryland, etc.:

"Know Ye that whereas Samuel Chase, Esquire, had on the twelfth day of April, seventeen hundred and seventy four, surveyed for him a tract or parcel of land called 'The Royal Charlotte' lying then in Frederick County but now in Washington and containing two thousand acres, by virtue of fourteen hundred and eighty acres part of a Special Warrant for two thousand acres, and five hundred and twenty acres part of a Common Warrant, for fifteen hundred acres, both granted him out of the Proprietary's land office according to the Conditions of Plantation, the twenty-fifth day of March, seventeen hundred and seventy-four, as appears: That the said Samuel Chase, Esquire, by an assignment dated the fifteenth day of January, seventeen hundred and eighty-five, transferred and made over all his right, title, interest and claim of in and to the certificate of the aforesaid survey and the land therein mentioned unto Thomas Hall of Harford County, and the right of the Proprietary being now vested in the State of Maryland.

"The State of Maryland, doth hereby grant unto him the said Thomas Hall the aforesaid tract or parcel of land called 'The Royal Charlotte' lying in Washington County aforesaid.

"Beginning at the end of the eighth line of the Manor on the Youghyongany River containing seventeen thousand seven hundred and fifty acres and running thence North, twenty-six degrees East, eight hundred and eighty-two perches; North, sixty-four degrees West,

three hundred and fifty-five perches; South, twenty six degrees West, nine hundred and forty four perches; then with a straight line to the beginning.

"Containing and now laid out for two thousand acres, according to the Certificate of Survey thereof taken and returned to the Land Office bearing date the twelfth day of April, seventeen hundred and seventy-four, and there remaining Together with all rights, profits, benefits and privileges thereunto belonging. To Have and To Hold the same unto him the said Thomas Hall his heirs and assigns forever.

"Given under the Great Seal of the State of Maryland this fourteenth day of May, seventeen hundred and eighty-seven.

"Witness the Honorable John Rogers, Esquire, Chancellor.

"W. SMALLWOOD. J. ROGERS, Chan'r."

(The Great Seal)

This tract of the ROYAL CHARLOTTE, *also extends west of the Fairfax Meridian and of the Deakins "line."*

The tract called THE DIADEM which is indicated on Plate 4 was patented on the 3rd day of December, 1791, and exhibited at page 704 of the Record, reads as follows:

"GEORGE ROBINS HAYWARD AND THOMAS HAYWARD, THEIR PATENT, 'THE DIADEM,' 1696 ACRES.

"The State of Maryland, etc.:

"Know Ye that Whereas George Robins Hayward of Talbot County by his Petition to the Honorable the Chancellor did set forth that a certain Robert Smith on the eleventh day of April seventeen hundred and seventy four had surveyed for him a tract of land lying then in Frederick, but now in Allegheny County called

'The Diadem,' containing one thousand six hundred and ninety six acres by virtue of a Special Warrant for four thousand acres obtained by him out of the Proprietary's Land Office according to the Conditions of Plantation the twenty fifth day of March seventeen hundred and seventy four as appear: That the said Robert Smith by an assignment dated the ninth day of July seventeen hundred and seventy four assigned and made over all his right, title and interest of, in and to the certificate of the said land unto the Petitioners father William Hayward late of Talbot County deceased as appears by the assignment endorsed on the Certificate of the said land: That the Petitioners father by his last will and testament duly made and executed, devised the said land unto his wife Margaret Hayward the Petitioners Mother, during her natural life, and after her decease, the same the petitioner and his brother Thomas Hayward (now a minor) and their heirs as Tenants in common; the Petitioner therefore prayed that a Patent might be issued to him and the said Thomas Hayward and their heirs, to the use of their said Mother Margaret Hayward for and during her natural life and after her decease to the Petitioner George Robins Hayward and Thomas Hayward and their heirs as Tenants in Common—And the facts appearing to the Chancellor to be truly stated it was thereupon ordered that a Patent should issue accordingly—

"The State of Maryland doth therefore hereby Grant unto the said George Robins Hayward and Thomas Hayward the said tract of land called 'The Diadem,' lying and being in Allegheny County aforesaid,

"Beginning at two bounded wild cherry trees standing by the side of McCullocks Road at the lower end of a glade on the North side of a fork of Muddy Creek about

three or four miles above where the aforesaid road crosses Muddy Creek which creek empties into the West side of the Great Youghyougany River about a mile below Murleys glades, and about fourteen or fifteen miles above the Province line, the aforesaid trees standing about South seventy five degrees East four hundred perches from a place known by the name of Isaac's Camp, and running thence North, sixty degrees East, two hundred and sixty seven perches; North, ten degrees East, one hundred and twenty two perches; North, sixty one degrees West, two hundred and eighteen perches; South, eighty three degrees West, two hundred and thirty seven perches; South, fifty two degrees West, three hundred perches; South, eighty four degrees West, one hundred and eighty six perches; South, thirty four degrees West, two hundred and fifty four perches; East, seven hundred and eighty perches, then with a straight line to the beginning.

"Containing one thousand six hundred and niety six acres, according to the Certificate of Survey thereof taken and returned into the Land Office bearing date the eleventh day of April, seventeen hundred and seventy four, and there remaining: Together with all rights, profits and privileges thereunto belonging: To Have and To Hold the same unto them the said George Robins Hayward and Thomas Hayward and their heirs, to the use of their said Mother Margaret Hayward for and during her natural life and after her decease to the aforesaid George Robins Hayward and Thomas Hayward and their heirs forever—as Tenants in Common, and not as joint Tenants to take by survivorship.

"Given under the Great Seal of The State of Maryland this third day of December seventeen hundred and ninety one.

"Witness the Honorable Alexander Contee Hanson, Esquire, Chancellor.

"GEO. PLATER. A. C. HANSON, Chan'r."

(The Great Seal.)

This tract of DIADEM, *as appears on Plate* 4, *also extends west of the Potomac Meridians and for a still greater distance west of the Fairfax and Deakins "line."*

And the tract called KINDNESS, which was patented on the 23rd day of October, 1793, and exhibited at page 692 of the Record, reads as follows:

"BAKER JOHNSON, ESQUIRE, HIS PATENT, 'KINDNESS,' 2072 ACRES.

"*State of Maryland set:*

"Know Ye that Whereas Baker Johnson, Esquire, of Frederick County had surveyed and laid out for him a tract or parcel of land called 'Kindness,' lying formerly in Frederick but now in Alleghany Couty containing two thousand and seventy-two acres by virtue of nineteen hundred acres part of a special warrant for six thousand acres granted him out of the late proprietary's Land Office according to the conditions of plantation the twenty-second day of April seventeen hundred and seventy-four as appears:—And the said Baker Johnson, Esq., having pursuant to law, paid to the Treasurer of the Western Shore the sum of sixty-four pounds ten shillings current money caution for the one hundred and seventy-two acres included in the said Survey over and above the part of a warrant aforesaid— And the right of the proprietary being now vested in the State of Maryland.

"The said State doth hereby grant unto him the said Baker Johnson, Esq., the said tract or parcel of land

called 'Kindness,' lying in Allegheny County aforesaid—

"Beginning at the end of the third line of 'The Promised Land,' and at or near a bounded maple and wild cherry tree, and running thence north ninety-eight perches; North, seventy-six degrees west, one hundred and sixty perches; South, four hundred and seven perches; South, twenty-nine degrees East, three hundred and nineteen perches; South, sixty-five degrees East, eighty perches; North, fifty-six degrees East, one hundred and thirty-seven perches; North, seventy degrees East, two hundred and fifty perches; North thirty-seven degrees East, two hundred and fifty-four perches; North, thirty-seven degrees West, two hundred and forty-eight perches; thence with a straight line to the beginning—

"Containing two thousand and seventy-two acres, according to the certificate of Survey thereof, taken and returned into the Land Office bearing date the thirtieth day of April, seventeen hundred and seventy-four and there remaining: Together with all rights, profits, benefits and privileges thereunto belonging— To Have and To Hold the same unto him the said Baker Johnson, Esq., his heirs and assigns forever.

"Given under the Great Seal of the State of Maryland, this twenty-third day of October, seventeen hundred and ninety-three.

"Witness The Honorable Alexander Contee Hanson, Esquire, Chancellor.

"THO. S. LEE. A. C. HANSON, Chan'r."

(The Great Seal)

The tract called KINDNESS *also extends westward beyond the Fairfax and Deakins "line."*

In addition to all the indubitable proof which has been submitted to show that the alleged Deakins "Line" did not mark and limit the western boundary of the State of Maryland, and that the Military Lots, as laid out by Deakins were far within that which this State might rightly claim, and in fact actually did claim, as its western boundary, as declared in the Acts of 1788, Chapter 44, which contained an express repuidation of the so-called Deakins "Line," and by its contemporaneous Grants and Patents of lands, we desire to respectfully call the attention of the Court to the testimony of D. Harrison Friend, a witness produced upon the part of the Plaintiff, whose testimony is found at pages 1127 and 1128 of the Record, and who testified as follows:

"Q. State your age, residence and occupation.

"A. My occupation is farmer, my age is ——; I was born the 27th of March, 1825. I reside here at Sang Run, Garrett County, State of Maryland.

"Q. Did you know John Friend and Gabriel Friend and William W. Hoye?

"A. Yes, sir.

"Q. Are they living or dead?

"A. Dead.

"Q. What relation, if any, were John Friend and Gabriel Friend to you?

"A. John Friend was my father and Gabriel Friend was my uncle.

"Q. Was Gabriel Friend your father's brother?

"A. Yes, sir.

"Q. When did your father die?

"A. I think in 1849.

"Q. Did you ever hear your father and your uncle, Gabriel Friend, say anything about laying out the Military Lots?

"A. I did.

"Q. Please state what they said to you about their connection with the laying out of the Military Lots.

(Objected to.)

"A. In reference to Virginia?

"Q Yes, sir?

"A. I understood them to say that in laying the soldiers' lots off that they *made sure that they would be on the Maryland side of the line that soldiers could not be cheated in the land awarded to them.*

"Q. What connection did William Hoye have with the survey or laying out of the Military Lots?

(Objected to.)

"A. I heard my father say that he was the surveyor when they located the Military Lots.

"Q. Did you ever hear your father or uncle Gabriel say anything about whether the line to which they laid out the Lots was recognized at the time as a boundary of the State?

(Objected to.)

"A. As a settled line?

"Q. Yes, sir?

(Objected to.)

"A. *I understood them to say it was not a settled line.*"

We respectfully submit that the Defendant has entirely and completely failed to substantiate its claims that the alleged Deakins "Line" was a true North line, that the same was run as a north and south line, and that the same was run by Francis Deakins as a boundary of the State of Maryland, and that the State of Maryland was in any way concluded by such alleged line as a boundary.

And we deferentially submit that it has been established by the Plaintiff by proof tantamount to demonstration that the Deakins "line" is not a meridian line at all; that it is not and was never authorized, intended or accepted by Maryland as a

boundary line; that it was repudiated by Maryland as a boundary line by an express statute never repealed or amended; that it is not a single continuous line at all, and that the State of Maryland both before, at the time and after it was laid down as the western boundaries of the Military Lots, granted and patented large tracts of land extending far to the west of it without the slightest notice or recognition of it as a line at all.

The Monroe Line.

The Fairfax and Potomac Meridians are astronomically true north lines, and are correctly run and located upon the ground and shown upon the plat of the Plaintiff, and this is not disputed. Both these meridians, as appears by the testimony, were established by Dr. L. A. Bauer, of the Division of Terrestrial Magnetism of the Coast and Geodetic Survey of the Government.

The Michler, or Fairfax, Meridian has been reproduced simply to show that the call in Lord Baltimore's Charter cannot be gratified by running a meridian from Fairfax Stone to the Mason and Dixon Line as the western boundary of Maryland, and for the further purpose of showing that the line located in 1894 by the State of West Virginia and designated upon the plat of the Plaintiff "Monroe Line," in red, was not run in compliance with the call in Maryland's Charter for either the western or southern boundaries of Maryland, and that said line as laid down by the defendant is not a reproduction of the alleged Deakins Line and is not a true north and south line; and we therefore submit that the same cannot be considered by this Honorable Court as a boundary line between the Plaintiff and Defendant.

The only line that has been laid down by either party to this cause, as a boundary line, is the Potomac Meridian, with its initial point at Potomac Spring, as shown upon the plat.

The State of West Virginia instructed her sruveyor to lay down a line beginning at Fairfax Stone and running north to Mason and Dixon Line, and the line was intended to be a reproduction of the alleged Deakins Line, and the said Monroe Line was the result of this location. An examination of the plats of both Plaintiff and Defendant will clearly show that this line does not coincide with the location of any line previously run. It does not coincide with the Fairfax or Michler Meridian and it does not retrace the western lines of any of the most western tier of Military Lots. It would, therefore, seem to be something entirely original and novel in its relation to the subject of inquiry in this case. It is certainly not a location of any boundary line, and it is not suggested by West Virginia that she intends it to be such.

The Monroe Line is an ordinary compass line, and was run with a constant allowance of 3° 40′ to the right for magnetic variation, and the Defendant did not take into consideration the declination that prevailed at the time said line was run.

The defendant did not know the declination of Fairfax Stone, nor did she acquaint herself with said declination at any point or station along the Fairfax Meridian.

In the testimony of Mr. Monroe, surveyor of the Defendant, found at pages 1718, 1719 and 1720 of the Record, he frankly admits that he did not know what the magnetic declination at Fairfax Stone was when he began his survey at said point, nor did he know it at Lauer Hill or Mason and Dixon line, and that his said line was not a straight line.

And this witness further states that during the course of Maryland's survey he learned the declination of both Mason and Dixon Line, which was 3° 47′, and Fairfax Stone, which was 3° 03′, a difference of 44′, and that it would be proper to apply such declination in order to obtain accuracy in location.

The admission on the part of Mr. Monroe that he did not know, and therefore did not take into consideration, the magnetic declination of the termini of said Monroe Line, proves

beyond question that the same is not a true north and south line, in addition to not being a straight line.

Indeed, it is nothing more than a reference line, from which to locate points in land surveys. We believe this is now admitted by the Defendant, and this Honorable Court cannot, we respectfully submit, give any consideration to said Monroe Line as marking or showing the loctaion of a boundary between the Plaintiff and Defendant.

While the Monroe Line and Fairfax Meridian have a common starting point at Fairfax Stone, they at once begin to diverge—the Monroe Line bearing off to the east, while the Fairfax Meridian pursues its course to the due north, and by actual survey on the part of the Plaintiff it was ascertained that at the end of 6,000 feet on the Fairfax Meridian the Monroe Line was 83.1 feet to the east and at the Mason and Dixon Line 190483 feet on said meridian, the Monroe Line was 1462.1 feet to the east; the Monroe Line does not retrace or coincide with the Fairfax Meridian, and is therefore not a true north line.

A full and complete table of the perpendicular distances of ascertained points in the Monroe Line to corresponding points in the Fairfax or Michler Meridian follows:

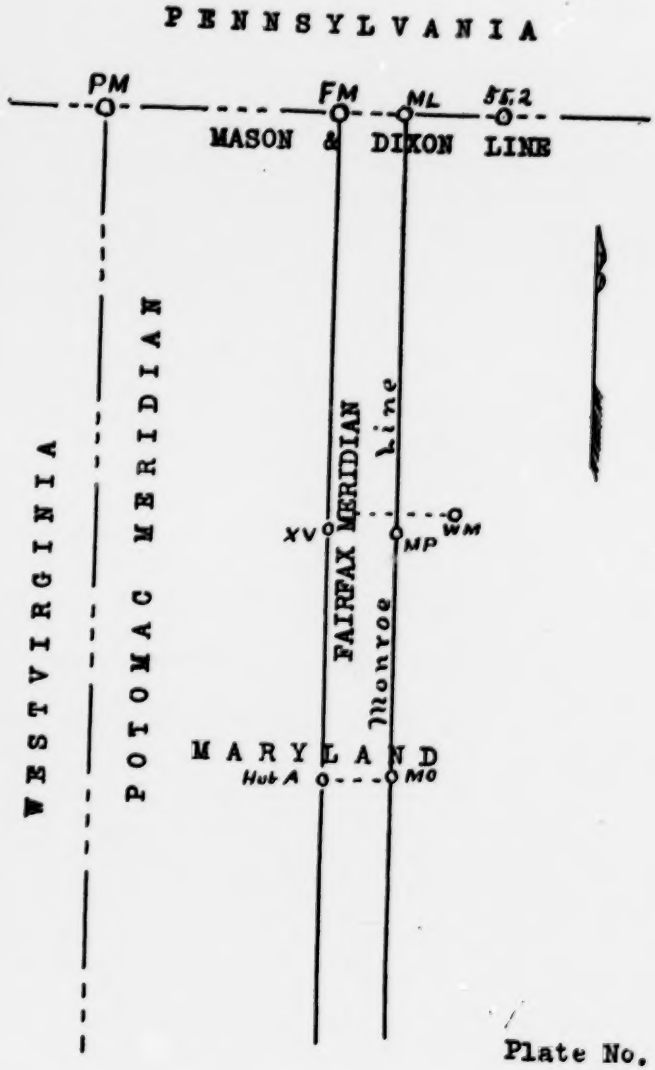

PENNSYLVANIA
PM
FM
ML
552
MASON & DIXON LINE
WEST VIRGINIA
POTOMAC MERIDIAN
FAIRFAX MERIDIAN
Monroe Line
XV
MP
WM
MARYLAND
Hub A
MO

Plate No. 8.

TABLE OF PERPENDICULAR DISTANCES OF CERTAIN STAKES SET BY MR. MONROE IN HIS LINE, TO CORRESPONDING POINTS IN THE "BAUER-MICHLER MERIDIAN," WITH LATITUDE AND DEPARTURE OF SAID STAKES, AS REFERRED TO "POTOMAC SPRING."

Distance on Monroe Line.	*Station.*	*Perpendicular Distance.*	*Latitude.*	*Departure.*
000 feet	Fairfax Stone	000 feet	..... 7168 ft. S.	..... 5982.8 ft. E.
3993.7 "	Potomac River	63.8 "	..... 3148 " "	..... 6045.6 " "
6000 "	Arnold Ridge	83.1 "	..... 1168 " "	..... 6064.5 " "
15092.6 "	Backbone Mt	207.8 "	..... 7924 " N.	..... 6186.6 " "
31640 "	Six Miles	428.3 "		
36960 "	Seven Miles	497.8 "		
42240 "	Eight Miles	554.2 "	..... 35698 " "	..... 6527 " "
44880 "	Near N. W. Pike	593.1 "	..... 38296 " "	..... 6565.4 " "
48630 "	Offutt's Hill	636.1 "	..... 41652 " "	..... 6607.5 " "
51186 "	Stahl's Hill	664.3 "	..... 44272 " "	..... 6635.1 " "
58080 "	Eleven Miles	751.8 "	..... 51023 " "	..... 6721 " "
84480 "	Sixteen Miles	1014.9 "	..... 77674 " "	..... 6977.9 " "
90565 "	Thomas & Ann	1068.5 "	..... 83804 " "	..... 7030.1 " "
105600 "	Twenty Miles	1204.7 "	..... 97958 " "	..... 7162.7 " "
120483 "	Elzey	1294.3 "		
129360 "	Cranesville	1327.8 "	..... 122257 " "	..... 7280.4 " "
136801 "	Hazleton Road	1356.3 "	..... 129456 " "	..... 7307.4 " "
163680 "	Thirty-one Miles	1419 "	..... 156049 " "	..... 7363.8 " "
172753 "	Cherry Hill	1436 "	..... 165215 " "	..... 7378.6 " "
179520 "	Thirty-four Miles	1449.1 "	..... 172040 " "	..... 7389.9 " "
190438.9 "	Mason and Dixon Line	1462.1 "	..... 183070 " "	..... 7400.8 " "

Upon no hypothesis whatever can the Monroe Line be regarded as making out or retracing or constituting in itself as an original location any boundary between Maryland and West Virginia, and is nothing but a line of reference without any significance in this case.

WEST VIRGINIA IS IN THIS CASE, BEFORE THIS COURT, WITHOUT ANY LINE AS A BOUNDARY LINE. SHE HAS NOT LOCATED ANY LINE WHATEVER AS A BOUNDARY LINE.

The Defendant having entirely failed by its location of the Monroe Line to reproduce either the alleged Deakins Line or the Michler or Fairfax Meridian, has not located any line as a boundary between the States, so far as this case is concerned, and has made no location which the Court can consider as defining her vague claims and contentions as set forth in the Record.

An inspection of the defendant's maps, Nos. 1 and 2, will show that there is no true north and south line nor even a continuous line laid down thereon to which the claims of West Virginia extend for her eastern boundary. It is admitted by the Defendant in the testimony of Mr. Monroe, her surveyor, at page 1626 of the Record, that his line, designated upon the plat of the p'aintiff "Monroe Line" in red. is merely a reference line run by the needle from Fairfax Stone northward to the Pennsylvania line.

This line was, therefore, not laid down as a boundary between the States, and as it was the only attempt made by the Defendant to indicate a line during the progress of the surveys in this case, we respectfully charge and aver that the defendant comes before this Court without having located any line as a boundary line.

The defendant denies that the Potomac Meridian is a boundary line; she denies that the Fairfax Meridian is a

boundary line; she has failed to locate any other line as a boundary; and the series of lines forming the western boundaries of the most western tier of Military Lots up to which she claims proprietorship and jurisdiction is shattered by the accumulated and overwhelming evidence in this case as either a meridian line or a boundary line, or as a continuous line at all; and in addition to all this the surveys and plats disclose the several extensive tracts of the Royal Charlotte, Non Pareil, Elder Spring, Diadem, Kindness, Thomas and Ann and Cherry Hill, extending under Maryland grants and patents not only far to the west beyond the western boundaries of the westernmost tier of Military Lots, but all going beyond the Fairfax or Michler Meridian and some of them beyond the Potomac Meridian.

Repeating again with the Court's indulgence that West Virginia denies that the Potomac Meridian is a boundary or that the Fairfax or Michler Meridian is a boundary and that she has not located any other boundary, we ask, in view of this anomaly, what is West Virginia's contention?

It is also pertinent to ask, that having failed to locate any line as a boundary, *where* does the defendant ask this Honorable Court to go in fixing and determining the eastern limits of her territory in the section of country in dispute in this case?

THE POTOMAC MERIDIAN THE ONLY LINE LAID DOWN AS A BOUNDARY.

The Potomac Meridian, located by the State of Maryland, with its initial point at Potomac Spring, the most western source of the Potomac River, and running thence north to Mason and Dixon Line as shown upon the plats of the Plaintiff, stands as the only line located in this case by either party as a boundary between Maryland and West Virginia which is before the Court and upon which as the case stands a decree can be rendered.

This Line was established on the part of Maryland according to the most approved methods known to modern engineering, and was fixed and prolonged by Dr. L. A. Bauer, of the Division of Terrestrial Magnetism of the Coast and Geodetic Survey of the Government.

The instruments employed were the best obtainable for this work, and it is stated with confidence that the Potomac Meridian was correctly and accurately located and properly marked as a boundary between the States.

See—Dr. Bauer's Report—Appendix C.

This case presents for final determination by this Court a dispute which admittedly has been open and pending for more than a century and which during that period has been the subject of continuous discussion and controversy between the sovereign parties to this suit.

Maryland has presented her claim plainly and definitely upon her plats, shown by the result of actual survey upon the ground, and precisely indicating the boundary for which she contends as lawfully hers.

On the other hand, West Virginia fails to set up any counter location illustrative of her contention.

In view of the very great importance of this matter to both parties, we submit the inquiry to this Tribunal, whether the strongest presumption ought not to obtain in favor of the clear and definite location which Maryland has made?

NO ACQUIESCENCE UPON THE PART OF MARYLAND IN THE OCCUPATION OR POSSESSION BY WEST VIRGINIA OF ANY PART OF THE TERRITORY EMBRACED IN THE CHARTER OF LORD BALTIMORE IN DISPUTE IN THIS CASE.

We most respectfully contend that in the light of the persistent and continuous assertion upon the part of the State of Maryland of her right to include within her boundaries all the territory granted in her Charter, no basis whatever can be found for the contention that she has acquiesced in an infringement upon her Charter rights. The history of the controversy regarding the boundary dispute which is the subject-matter of the suit now before the Court shows beyond all question that neither Maryland upon the one hand nor Virginia or West Virginia upon the other has ever regarded the question as settled. For over one hundred and fifty years constant and unremitting efforts upon the part of Maryland have been made to reach some settlement and determination of the matter. Commissioners have been appointed from time to time by both States and active steps have been taken to reach some settlement, but no arrangement has ever been made which was acceptable to both parties to the controversy.

From the action of all parties interested in the question it is impossible to contend that the matter has ever been regarded as settled, but upon the contrary it most clearly and conclusively appears that it has upon all sides and by everybody been regarded as absolutely open and subject to future determination. If this is true, how can it be contended that Maryland has acquiesced in any invasion of her territory?

No authority, we submit, can be found for the proposition that a State can be deprived of its territory by mere laspe of time or by mere occupancy, when all the while such State has challenged and denied the right of the invading party and repeatedly and persistently declared her own rights and when the right of such invasion and occupancy is universally re-

garded and again and again asserted to be an open, unsettled and pending question.

Without again reviewing the different steps in the controversy, we submit that the Record shows that certainly down to 1859 the State of Virginia recognized that the dispute was still pending and that the rights of both parties were the subject of negotiation and settlement. The Michler Line was then run for the purpose of bringing the matter to a final determination. The failure of Virginia to ratify the work of Lieut. Michler and establish the line run by him as the boundary between the two States left the controversy as it before stood and remitted Maryland to her Charter rights.

That the act of the Maryland Legislature of 1860 was not effective as a ratification of the Michler Line, in view of Virginia's failure to unite with Maryland in accepting and ratifying that line, is shown by taking that act, as it certainly in all justice and according to every known canon of construction must be taken, as *in pari materia* with the Maryland Act of 1852 and the Virginia Act of 1858. That there was no legal ratification by the Act of 1860 or acquiescence by Maryland in any settlement or boundary is clearly demonstrated by the opinion of Chief Justice Marshall in Doddridge vs. Thompson, 9 Wheaton, 476-479, in which a similar point was explicitly passed upon. In that case the Chief Justice said:

> "In March, 1804, Congress passed a law for ascertaining the boundary of the land reserved by the State of Virginia for military bounties, which enacts, 'that a line under the direction of the Surveyor General of the United States, from the source of the Little Miami towards the source of the Scioto, and which binds, on the east, the surveys of the lands of the United States, shall, together with its course continued to the Scioto River, be considered and held as the westerly boundary line, north of the source of the Little Miami, of the territory

reserved by the State of Virginia, between the [illegible] Miami and the Scioto Rivers, for the use of the officers and soldiers of the continental line of that State; Provided, that the State of Virginia, shall, within two years after the passing of this act, recognize such line as the boundary of the said territory.' The line mentioned in this act is called Ludlow's Line.

"This Act shows, we think, very clearly, that Congress did not mean to assert a power to fix the western boundary of the military reserve. The deed of cession and the act of acceptance, were considered as forming a contract respecting a territory the western line of which could not, at the time, be fixed with precision, and which was unavoidably described in terms requiring subsequent explanation and adjustment. This adjustment was to be made, not by one of the parties, but by both; and this act is an essay towards it. Congress makes a proposition to Virginia, by which the United States are to be bound, provided Virginia accepts it within two years. If it be not accepted within that time, *the parties stand on their original rights, as if it had never been made.* This is a very fair and equitable proceeding on the part of the Government, and is founded on the idea that the rights of the parties are equal. Had Virginia accepted this proposition, it would have become a contract, and Ludlow's Line would have been established as the western boundary of the military reserve, the land in controversy lying west of that line would not have been liable to be surveyed to satisfy the plaintiff's warrant. But Virginia did not accept the proposition, *and the rights of the parties remained as if it had never been made.*

"In 1812, Congress made another effort to establish this line. The President was authorized to appoint three commissioners to meet commissioners to be appointed by Virginia, who were to agree on the western line of the

military reserve and to cause the same to be surveyed and marked out. Should commissioners from Virginia fail to meet them, they were to proceed alone and make their report to the Executive. In the meantime, and until the line should be established by consent, Ludlow's Line was to be considered as constituting the western boundary of the Virginia reserve.

"The Commissioners of the United States were met by those of Virginia, and they proceeded to ascertain the sources of the two rivers, and employed a Mr. Charles Roberts to survey and mark a line, from the source of one to that of the other. This line is called *Roberts'* Line, is reported by the Commissioners to the Executive, and is found in the case agreed, to represent truly a line drawn from the source of the Little Miami to the source of the Scioto. The Virginia Commissioners, however, refused to accede to this line, and claimed to run, from the source of the Scioto, a straight line to the mouth of the Little Miami, which would pass south of that river and include a considerable tract of country not lying between that river and the Scioto. This demand prevented an agreement establishing Roberts' Line; and as the Act of June, 1812, provisionally designated Ludlow's Line as the western boundary of the reserve, until one should be finally established with the consent of Virginia, it remains the boundary for the present. Had the plaintiff's title been acquired subsequent to the passage of this act, there would be much force in the objection to it; but it was acquired before this act passed, and can not, we think, be affected by it. Congress can not have intended to annul, by a legislative act, a title which was valid at the time; and a law which does not express that intention ought not to have that effect given to it by construction. If the words of the Act of 1804 were doubtful, which they are not, the Act of 1812 would expound them,

and show that not even a temporary boundary had been previously fixed. The appointment of commissioners to meet others to be appointed by Virginia, who were to agree upon and mark the true line, and the establishment of a temporary line till such agreements should be made, *prove incontestably, that Congress did not suppose the line to be established.* Had the Commissioners from Virginia assented to the equitable proposition made by those of the United States, the plaintiff's patent, founded on a survey made before that time, would be admitted to be unassailable. And yet the land was, in fact, within the territory actually reserved at the time the survey was made, and no law had been passed substituting any other line for the true one."

In Reynolds vs. M'Arthur, 2 Peters, 417, Chief Justice Marshall, delivering the opinion of this Court, said:

"It has already been stated that the Act of 23rd of March, 1804, establishes Ludlow's Line, not absolutely, but on conditions that Virginia should assent to it; and that Virginia never did assent to it.

"It has also been stated that in 1812, Congress authorized the President to appoint Commissioners who should proceed in concert with such as might be appointed by Virginia, to run a line which should constitute the western boundary of the Virginia military reserves. These Commissioners did meet and did cause a line to run from the source of the Little Miami to the source of the Scioto. This is called Roberts's Line. *The Commissioners of Virginia did not assent to this line. Consequently it is of no operation.*"

The formation of the State of West Virginia substituted that State for Virginia as a party to this open controversy.

That West Virginia viewed the boundary dispute as still pending is unmistakably shown by the Act of its Legislature of 1868, Ch. 175, which is as follows:

"An Act to Provide for the Establishment of the State Line Between This State and the State of Maryland.

"Be it enacted by the Legislature of West Virginia:

"1. The Governor of this State is authorized to appoint a commissioner on the part of the State of West Virginia, *to ascertain the true line* between the State of West Virgina and the State of Maryland, commencing at the Fairfax Stone, thence to the Pennsylvania State Line.

"2. The Governor of this State is authorized to communicate with the Governor of the State of Maryland, with a view to a joint survey of said line and establishment of the same, and report his proceedings under this Act to the next annual meeting of the Legislature of this State."

But still the "true line" remained admittedly unsettled and in dispute.

In 1887 it again appears that West Virginia as well as Maryland still regarded the question as unsettled, as is clearly and indisputably shown by the following statute:

"Acts of 1887 of West Virginia, Chapter I.—An Act to Confirm and Establish a Part of the Boundary Line Between the State of West Virginia and the State of Maryland (passed May 3, 1887).

"Be it enacted by the Legislature of West Virginia:

"1. That the boundary line as run and marked by N. Micheler, U. S. engineer, in the year one thousand eight hundred and fifty-nine, under the direction of J. W. McDonald, commissioner on the part of Virginia, and Thomas J. Lee, commissioner on the part of Mary-

land, from the Fairfax Stone to the Pennsylvania line between the county of Preston, West Virginia, and the county of Allegany, now Garrett, Maryland, be and the same is hereby approved and confirmed as the true boundary line between the State of West Virginia and the State of Maryland.

"2 But this Act shall not take effect until and unless the State of Maryland shall pass an Act or Acts confirming and rendering valid all entries, grants, patents and titles from the Commonwealth of Virginia, to any person or persons, to lands situate and lying between the new Maryland line hereby established, and the old Maryland line heretofore claimed by Virginia and West Virginia to the same extent and to like legal effect, as though said old Maryland line were hereby confirmed and established."

It was only three years after that Act was passed that this suit was instituted in this Court by the Honorable William Pinkney Whyte, then Attorney-General of Maryland.

We again repeat that, apart entirely from the question of possession or occupancy, this clear recognition by all the parties to the controversy that Maryland had never waived any of its rights under its Charter, but was simply seeking to reach some amicable settlement of the question, removes entirely from the case any tenable contention that she has lost anything by mere delay in bringing the dispute before this Honorable Court, or that any of her Charter rights have been forfeited by acquiescence.

We respectfully submit that none of the cases in which the doctrine of acquiescence has been applied in the decision of boundary disputes between States of the Union are applicable to this case, for in this case there are facts which entirely overcome any suggestion of acquiescence in an adverse claim to the plaintiff's domain.

In Louisiana vs. Mississippi, 202 U. S. 53, this Court said:

"Moreover, it appears from the record that the various departments of the United States Government have recognized Louisiana's ownership of the disputed area; that Louisiana has always asserted it; and that Mississippi has repeatedly recognized it, and *not until recently has disputed it.*

"The question is one of boundary, and this Court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of acquisition by prescription of large tracts of country claimed by both."

In the case now before the Court it has been seen that there has been a dispute pending for many years, and that it has been constantly recognized as unsettled. This, of course, excludes from this case the doctrine applied in the above case.

In the case of Virginia vs. Tennessee, 148 U. S. 503, the doctrine of acquiescence was again applied. There the dispute had been settled by compact solemnly entered into between the two States and recognized as in force by both of them for many years. The principal question determined there was that express consent was not necessary in order to give the compact or agreement validity, but that it could be impliedly ratified by Congress by a recognition of its existence in Federal legislation. We have shown that in this case no agreement was ever reached by the two States and that all the legislation looking to a final settlement was rendered nugatory by the failure of one or the other to ratify any proposed settlement.

The case of Rhode Island vs. Massachusetts, 4 Howard, 591, is of the same character as that of Virginia vs. Tennessee, *supra*. The boundary had been settled by Commission-

ers, which line was approved by both States. This Court held that the parties were bound by their sanction given to this boundary and their long acquiescence in the settlement so reached.

All the cases which have involved the question of acquiescence might be reviewed and the same wide distinction between them and this case pointed out, but we rest upon the statement which is warranted by all these cases that *in no single instance has this Court held that the doctrine of acquiescence can be invoked or applied where the boundary between the two States has all the time before the filing of suit in this Court been recognized by both of the States concerned as unsettled and subject to future determination.*

The law, as laid down by this Court through Chief Justice Marshall in Doddridge vs. Thompson and M'Arthur vs. Reynolds, cited above, shows clearly that there is *no acquiescence* where the contending parties have not come to an agreement and are still contending, as evinced by the fact that the matter in controversy is still the subject of open dispute and challenge as between them. With respect to the territory here involved, Maryland, instead of acquiescing, has unfailingly impugned, traversed and denied West Virginia's right and claim as she formerly had combated the right and claim of Virginia before West Virginia was formed. The Record shows that the matter has been always as much and as expressly at issue between the contending States as it is today. Where a controversy is thus notoriously open, unsettled and pending between two States, and is so mutually regarded and acknowledged by them, and where, accordingly, each of them, from time to time, has been suggesting the appointment of commissioners to arbitrate the matter, and on various occasions has actually appointed them for that purpose, neither can be held to have abandoned her rights to the other, nor to have acquiesced in the claims of the other, nor to have either

lost or acquired title by acquiescence or prescription, which, according to every writer on public and international law, is founded upon a *presumed abandonment* of right, and cannot arise where presumption of abandonment is rebutted and negatived by open and express declarations to the contrary.

Thus Vattel—Chitty's Edition, Book II, Ch. 11, par. 139, etc.—says:

> "Let us conclude what relates to domain and property with an examination of a celebrated question on which the learned are much divided. It is asked whether usucaption and prescription can take place between independent nations and states.
>
> Usucaption is the acquisition of domain founded on a long possession, uninterrupted and *undisputed*—that is to say, an acquisition solely proved by this possession. Wolf defines it an acquisition of domain *founded on a presumed desertion.* His definition *explains* the manner in which a long and peaceable possession may serve to establish the acquisition of domain. * * *
>
> "Prescription is the *exclusion of all pretensions* to a right—an exclusion founded on the length of time *during which that right has been neglected;* or, according to Wolf's definition, it is the loss of an inherent right *by virtue of a presumed consent.* This definition, too, is just; that is, it explains how a right may be *forfeited by long neglect;* and it agrees with the nominal definition we give of the term, prescription, in which we confine ourselves to the meaning usually annexed to the word. * * *
>
> "We must not therefore conceive the right of private property to be a right of so extensive and imprescriptible a nature, that the proprietor may, at the risk of every inconvenience thence resulting to human society, *absolutely neglect it* for a length of time, and afterwards reclaim it, according to his caprice. * * * For the

same reason, therefore, the same law requires that every proprietor who for a long time and without any just reason *neglects his right, should be presumed to have entirely renounced and abandoned it. This is what forms the absolute presumption* (*juris et de jure*) *of its abandonment,*—a presumption upon which another person is legally entitled to appropriate to himself the thing *so abandoned.* * * *

It is true, that, if the *bona fide* possessor should discover with perfect certainty, that the claimant is the real proprietor, *and has never abandoned his right,* he is bound in conscience, and by the eternal principles of justice, to make restitution of whatever accession of wealth he has derived from the property of the claimant. But this estimation is not easily made; and it depends on circumstances. * * *

"As prescription *cannot* be grounded on *any but* an absolute or lawful presumption, *it has no foundation, if the proprietor has not really neglected his right.* This condition implies three particulars: 1, that the proprietor cannot allege an invincible ignorance, either on his own part, or on that of the persons from whom he derives his right; * * * 2, that he cannot justify *his silence* by lawful and substantial reasons; * * * 3, *that he has neglected his right, or kept silence during a considerable number of years;* for, the negligence of a few years, being capable of producing confusion and rendering doubtful the respective rights of the parties, is not sufficient to found or authorize a presumptive relinquishment. * * *

"It is also very evident that we cannot plead prescription in opposition to a proprietor who, being for the present unable to prosecute his right, *confines himself to a notification, by any token whatever, sufficient to show that it is not his intention to abandon it. Protests an-*

swer this purpose. With sovereigns it is usual to retain the title and arms of a sovereignty or province, as an *evidence that they do not relinquish their claims to it.*

"Every proprietor who expressly commits or omits certain acts which he cannot commit or omit *without renouncing his right, sufficiently indicates by such commission or omission that it is not his intention to preserve it, unless, by* AN EXPRESS RESERVATION, HE DECLARE THE CONTRARY." * * *

In Martin's Law of Nations, Book II, Chap. iii, section 1, title, "Of Prescription," it is said:

"On this subject the following questions are often started, viz: Ought prescription to be considered as a particular source of right among nations and as a means of acquiring or losing a right? Does it make a part of the universal law of nations, and is it admitted as such by the powers of Europe?—A nation may certainly renounce the property or rights its possesses, in undertaking actions which prove such renunciation; and in losing its rights it may authorize another to acquire them. But, the main object is to know whether abstaining from the use of certain property or rights or *whether keeping silence* voluntarily and knowingly, while another makes use of them, can deprive a nation of such property and rights and authorize another to seize on them irrevocably: *this is what we have in view* when we examine whether *prescription* has any right or not among independent nations.

"Abstaining from the use of a right or *keeping silence* while another makes use of it can never have the force of consent, except we are obliged to speak of or make use of a right; and this obligation cannot exist among independent powers, according to the universal law of nations in its strict sense. * * *

"It is true the powers of Europe often urge the right of prescription; they seem even to acknowledge the force of it *in having recourse to declarations in order to preserve* their rights. * * * (2) Sometimes they understand by prescription the extinction of a right which has been *tacitly renounced* by actions *which prove the consent;* (3) *declarations are often employed* as an additional means of *securing a right,* which the possessor would not, however, think of losing without this precaution; and (4) *declarations* are sometmes essential to hinder certain actions, which a nation has been obliged to undertake from being looked upon as amounting to a tacit consent."

And similarly Puffendorf, in his "Law of Nature and Nations," in which the foundations and fabric of the law of Prescription are elaborately analyzed—Book IV, Chapter 12, section 4, says:

"Another necessary condition to Prescription is that it be founded on constant possession such as hath not been interrupted either *naturally,* as if the thing hath returned in the meantime to its former owner, etc.; or *civilly,* as if the owner hath been actually engaged at law with the possessor for the recovery of what he lost, *or at least by solemn protestations hath put in a salvo to his right."*

And he says that Grotius

"lays the foundation of it (prescription) in the *tacit dereliction* of the former proprietor;" and "that prescription can take place in those things alone which the former owner hath not renounced either by words or by an express deed or overt act, *but in which we presume his inclination to leave them, from his neglecting to inquire after them and to challenge them again."*

And Puffendorf declares even the above statement of the law by Grotius to be too unqualified, and proceeds immediately to comment on it thus:

> "Though all this be very plausibly alleged, yet it is certain that a long-continued *silence* does not always give us sufficient ground to suppose a *tacit dereliction,* for * * * so again, if a man *claims* his goods, though after never so long a season, 'tis manifest that he did not before absolutely abandon and give them over. And, consequently, this foundation for prescription will not be such as shall hold universally or extend to all cases."

And this is announced to be the law in the very recent authority which we next respectfully cite.

In the learned Article on International Law from the pen of one of the Justices of this Honorable Court, in 22 Cyclopedia of Law and Procedure, *sub-title* "Prescription," pages 1728-29, it is said:

> "Some writers add to these methods of acquisition that of prescription, which is the acquisition of territory by continuous and *undisputed* exercise of sovereignty during a period long enough to create the conviction that that condition of things is in conformity with national law and order. But no general rule can be laid down as to the length of time and *other circumstances necessary* to create a title by prescription, and *everything depends upon the merits of the individual case.*"

And so Oppenheim, International Law, Volume I, section 243, after defining prescription in international law, declares:

> "From the conception of prescription, as above defined, it becomse apparent that no general rule can be laid down as regards the length of time *and other circumstances* which are necessary to create a title by pre-

scription. Everything depends upon the merits of the individual case. *As long as other powers keep up protests and claims, neither is the actual exercise of sovereignty undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order.* But *after* such protests and claims, if any, *cease to be repeated,* the actual possession ceases to be disturbed, and thus, under certain circumstances, matters may gradually ripen into that condition which is in conformity with international order. The question, at what time and under what circumstances such a condition of things arises, is *not one of law, but of fact.*"

And the eminent authority last above cited refers to Heimburger, pages 151-155, as pointing out with great lucidity that "the *basis* of prescription in International Law is *nothing else than the recognition of a fact,*" and also that Heimburger "rejects prescription as a mode of acquiring territory, maintaining that there is a customary rule of International Law in existence according to which RECOGNITION can make good an originally wrongful possession."

And similarly in the case of the dispute about the boundary of Alaska between Great Britain and the United States, where the question of prescription was involved and after a provisional line had been laid down and adopted between the sovereign parties to that controversy, Mr. Hay, Secretary of State, on August 3, 1900, wrote:

> "The rights of the United States in the matter of the treaty boundary are *absolutely intact,* and their assertion in due time will be earnest and thorough."

This was the position taken by President Cleveland and President McKinley, and acknowledged to be correct by Great Britain.

See— 1 Moore's International Law Digest, section 107, pages 466-475.

THERE ARE OTHER REASONS WHY THE CLAIM OF ADVERSE POSSESSION SET UP BY WEST VIRGINIA CANNOT STAND IN THIS CASE.

This case being a controversy between two separate and independent governments and no private or individual rights being in question, we respectfully submit that the claim of adverse possession set up by the Defendant to the land to the west of the irregular broken line marking the eastern boundary of grants made by the State of Virginia, and also to the west of line drawn north from the Fairfax Stone to the Mason and Dixon Line, cannot prevail, when upon the face of the Record itself, as made up by the Defendant, there is a clear recognition of the right of the Plaintiff to grant title, and through its grantees and those claiming under them, to hold possession of land west of such a line or lines.

"Adverse possession, in order to be effectual, must be exclusive," and such possession in a controversy between individuals, in order to be effectual and bar the legal owners "must be not only actual, adverse and exclusive, but must be visible, and notorious."

Beatty vs. Mason, 30 Md., page 409.
Armstrong vs. Risteau, 5 Md., page 256.

In the case of Rhode Island against Massachusetts, 12 Peters, page 657, the Court, in passing upon a question of boundary between two separate and independent States, said that "no Court acts differently in deciding on boundaries between States and on lines between separate tracts of land."

And it must, therefore, be assumed that the same rule of decision will apply as though this were a question of location and possession between different tracts of land.

The State of Maryland knew that if Lord Fairfax, as the Proprietary of the Northern Neck of Virginia and the Royal government had ever, at any time, disputed with Lord Baltimore as to the western limits of his property, the State of

Virginia, as the successor in title of both Lord Fairfax and the crown, had by its first Constitution, adopted on the 29th day of June, 1776, expressly recognized the title of the State of Maryland to all the territory originally embraced within the Charter under which the colony of Maryland had been erected, and that the State of Maryland as such successor in title, had the right and authority to sell and convey away to its grantees any and all of the land not theretofore granted which lay within the boundary of the State, according to the original Charter. So we respectfully submit that the first several tracts of land all granted by Maryland, to wit, the Royal Charlotte, Kindness, Thomas & Ann, The Diadem, Elder Spring, and Cherry Hill were located within the State of Maryland and not beyond its limits, and that the State of Maryland had jurisdiction and dominion of the soil within the lines of the said several tracts of land as well as like authority over all the land east of the meridian of Potomac Spring, and that it conferred upon its grantees by its letters-patent an absolute good and indefeasible title to said tracts of land, and that the grant of land by the State of Virginia east of a meridian drawn north from Potomac Spring to the Mason and Dixon Line was an unwarranted invasion of the territory of Maryland, that such grant of land conferred no title whatever upon patentees of the State of Virginia and that such patents did not even make color of title in the hands of such patentees against the paramount title of the State of Maryland and its patentees; and that no possession taken under said grants can now be urged as a possession adverse to the title of the State of Maryland to the land within the lines of any of said Virginia grants.

In the case of Baker vs. Swan, 32 Md., page 355, which was an action of ejectment for a tract of land in Allegany County, Maryland, called Skipnish, patented by the State of Maryland to General John Swan, in 1803, the Appellant,

Baker, offered in evidence a Land Office warrant issued by the State of Virgina and a patent granted thereon to John Hooker by that State, dated September 2nd, 1788, and described as located in Monongalia County in the State of Virginia, and followed this up by the offer of a deed from John Hooker, the Patentee, to John Hoye, dated April 15th, 1805, of the same land described in the patent, together with other land all described as located in Virginia.

The object of this evidence was to prove color of title, so as to make out such a matured claim to the land sued for by adverse possession as would defeat the right of the Appellees without the necessity of showing actual enclosures as required prior to the Maryland Act of 1852, Chap. 177.

The Court of Appeals of Maryland, Chief Justice Alvey, delivering the opinion, said (page 359):

> "The title papers originating in Virginia for land described as and declared to be located within that State are simply void as to titles within the limits of Maryland, and never being intended to operate upon lands beyond the limits of Virginia, they have nothing upon their face of a colorable character from which a party could suppose that his possession under them was justified.
> * * * * * * * * * *
>
> "In Jackson vs. Ingraham, 4 John, 163, a question very similar to the present arose on the effect of a grant of land by the French Government in Canada prior to the Treaty between Great Britain and France in 1763; the land being situated on Lake Champlain within the province of New York. On defense taken under the grant, the Supreme Court of New York held that they could not take notice of any title to land not derived from their government or the province of New York; and the Defendant's possession under title derived from the French grant was not allowed to prevail. And in Jackson vs. Waters, 12 John. 365, the defence was founded

on the same French grant as the defense in the preceding case of Jackson vs. Ingraham, and the Supreme Court, deciding in accordance with its previous decision, said: 'The Lessor of the Plaintiff produced and proved a regular title for the premises in question under a patent to Elkanah Dean, dated the 11th of July, 1769, and the only question in the case is whether such an adverse possession was shown as to take away the right to recover in this form of action. The origin of the adverse possession set up by the Defendant is that taken by La Framboise in the year 1763, by permission of Mackay, who claimed under a grant made by the French government of Canada to La Gauchetierre, prior to the conquest of Canada by the British. In Jackson vs. Ingraham, 4 John. 182, it was held by this Court that we could not notice any titles to land not derived from our own government; that grants from the French government were to be treated as nullities and absolutely void, and could not afford any legal evidence of title which we could recognize. And if such be the light in which these pretended titles are to be viewed, *the possession taken under these grants ought also to be considered as unavailing for any purpose. It cannot be deemed a possession in hostility to any private or individual right; but, rather, as a controversy between the two governments* in no way affecting individual claims, further than they were recognized and secured by the Treaty of 1763.' We do not deem further authority as to the effect of the Virginia title papers necessary, regarding the cases just cited as amply supporting the conclusion to which we have arrived and to which we would have come in the absence of all authority on the subject."

See—

Robinson vs. Minor, 10 Howard, 643-44.
Pool vs. Fleeger, 11 Peters, 210.
Henderson vs. Poindexter, 12 Wheat. 530.

But, the State of Virginia, aside from her recognition of the right of the State of Maryland to all the land contained within the Charter to Lord Baltimore as declared in her first Constitution, further expressly admitted the right of the Proprietary of Maryland and the State as well, to territory west of the meridian drawn north from the Fairfax Stone, to the Mason and Dixon Line, in different patents which she granted for land west of such meridian, wherein the State of Virginia called for the lines of certain tracts of land patented by the State of Maryland that extended west of such meridian

In the patent for the Francis and William Deakins 6,000 acre tract, located by the Plaintiff, and which also appears upon the plats of both parties to this cause, an actual survey of certain of its lines was made by the surveyor on the part of Maryland as returned by him and found at pages 967 and 968 of the Record.

The 38th line of this tract of land, a copy for the patent of the same being exhibited at pages 824 and 825 of the Record, calls to run as follows: North 89½°, east 196 perches to a tract of land called Ashby's Cove. This line, as located by the Plaintiff, ran north 89½° east 197 perches to the third line of said tract called Ashby's Cove, a correction of one perch to reach the call as contained in the patent. And the 39th line of said tract calls to run north 10½° east 41 perches to the sixth line of a tract of land called Thomas and Ann, and with it reversed the four following courses: North 76° west 40 perches, north 12½° east 217 perches, north 28° east 70 perches, north 875 perches to Albert Gallatin's survey, and with it west 590 perches to a tract of land patented in Maryland called Non Pariel, thence south 114 perches to the beginning tree of said tract called Non Pariel, and with the following line of it reversed south 24° east 371 perches, south 80° west 90 perches, south 30° west 36 perches, south 40 perches, south 85°, west 91 perches.

The location of the Maryland grant called for in this Virginia patent as they appear upon the plats of both the Plaintiff and Defendant in this cause, show that the State of Virginia stopped her own grant west of Fairfax Meridian with the calls for the Maryland patents west of said Meridian.

This was a distinct recognition of the right of the Proprietary of Maryland to grant land west of a meridian drawn north from the Fairfax Stone and even west of a meridian drawn north from Potomac Spring. And we respectfully submit that the State of West Virginia is estopped to deny the fact that her predecessor in title recognized the right of the Plaintiff to convey title to said tracts of land, Ashby's Cove, Thomas and Ann and Non Pariel, thereby delimiting and fixing the boundaries of her own grant.

These calls in the Francis and William Deakins 6,000-acre tract are both descriptive and imperative, and the State of Virginia, as grantor, by making said calls, expressly admitted the right of the State of Maryland to grant title to land within the lines of the several tracts by which the boundaries of this Virginia patent were fixed and determined. If this were a question between individual owners of adjoining tracts of land, it would be held without hesitation by this Court that the junior grant should stop when it reached its call for the lines of the senior patent, and if the same rule of decision applies in the case of boundaries between States as is applicable to the lines of different and adjoining tracts of land as heretofore held by this Honorable Court, we respectfully submit that the State of Virginia, in calling in its grant for the lines of these Maryland patents, thereby recognized and admitted the right of the State of Maryland to grant title to the land contained within the lines of her said several grants above mentioned.

In 5 Cyc., title "Boundaries," page 930, this principle is laid down, with many citations in support of it, as follows:

"Where survey lines conflict, the lines of the elder

survey will prevail over those of the junior, and this is particularly so where the junior is bounded with express reference to the elder."

The State of Virginia has recognized the right of the Proprietary of Maryland and the State, as his successor in title, to grant title to land west of the meridian of Fairfax Stone by calling in its grant of 500 acres to Francis and William Deakins, dated the 9th day of October, 1790, and exhibited at page 1807 of the Record, for the lines of the Maryland grant called Elder Spring. This tract appears upon the plat of the Defendant, designated thereon "Deakins 500," and described in the patent as follows:

"Beginning at the end of 13 poles on the fourteenth line of a tract of land, Elder Spring, originally granted and patented by the State of Maryland unto the aforesaid Francis Deakins, and running thence south 51° east 43 poles, north 77° east 80 poles, north 41° east 40 poles, north 70° west 76 poles to a bounded white oak and black gum, they being the beginning trees of aforesaid tract of land called Elder Spring. Thence north 60° east 64 poles, east 90 poles, south 424 poles, west 295 poles, thence by a straight line to the beginning, with its appurtenances."

These calls for the lines of the Elder Spring tract was a clear recognition of the right of Maryland to the dominion of the soil west of a meridian line drawn north from Fairfax Stone, and the Defendant is concluded by the calls in the Virginia patent and is estopped to deny that she is so bound.

And the State of Virginia further recognized the right of the Proprietary of Maryland and the State, as his successor in title, to grant title to land west of the meridian drawn north from Fairfax Stone in the case of the grant by the State of Virginia to Henry Deal for the tract of 367 acres

and 328 acres, respectively, exhibited by the Defendant at pages 1808 and 1809 of the Record.

The tract of 367 acres called for the lines of David Kelly and James Ervin, and the 328-acre tract called for the lines of Daniel Raymond, Henry Kelley and James Ervin, and, as will be shown hereafter, these parties were all tenants in possession of subdivisions of the Maryland tract called Elder Spring, whose lines thus called for in the Deal surveys extended west from a meridian drawn north from the Fairfax Stone. In the testimony of Mr. Monroe, surveyor on the part of the Defendant, found at pages 740-741 of the Record, he said:

"262nd Q. In locating the Henry Deal 367 acres on your map, did you not locate it as you have because it had lines common with the Elder Spring grant?

"A. I did not. I ran sufficient of these lines to convince me that the location was correct.

"268th Q. What line of that tract did you locate by actual survey upon the ground?

"A. I ran a reference line to a known corner in two places, and also ran the southern line there of the Deal tract.

"269th Q. When did you run the southern line of said tract?

"A. I believe, upon examination, I am mistaken about running the southern line of this tract. I was under the impression that I had. I find I only ran a reference line, or reference line to two or three known corners of this tract.

2927. Plaintiff moves to strike defendant's location of the Henry Deal 367-acre tract from the plat.

"The Witness: I did also run a reference line from the point near the southeast corner of this tract to a point opposite the northeast corner, and found it conformed to the description of said tract—the known corner.

"270th Q. In locating the Henry Deal 328-acre survey on your map, did you not so locate it, because it had lines common with the Elder Spring grant?

"A. The Elder Spring and Henry Deal 367-acre tract had common lines and known corners.

"271st Q. How do you know that the patent calls for lines common to the Elder Spring grant?

"A. In the general description of this patent, it calls to adjoin lands of said Deal on the south and east sides, and the lands of James Irvin, Henry Kelly (?) and Raymond tract called Elder Springs survey.

"272nd Q. That is the description contained in the original survey of the tract, is it not?

"A. Yes, sir.

"273rd Q. As a matter of fact, you do not know what the calls are in the patent, do you?

"A. I do not, except that it would be based upon the survey of the tract.

"274th Q. Did you locate this tract upon the ground?

"A. I did not.

Plaintiff moves to strike out defendant's location of the Henry Deal 328-acre survey on the map.

"275th Q. You have stated that the Elder Spring lines do not correspond with the Henry Deal 328-acre survey lines?

"A. Not exactly.

"276th Q. Where do you show this discrepancy upon your map?

"A. It is not shown.

"277th Q. Is it not a fact that you have protracted this tract upon the map, and made it fit the Elder Spring grant without regard to the calls?

"A. It is simply protracted around the Elder Spring tract, and the lines of the Elder Spring tract are assumed to be the lines of the Deal tract from that on. As a matter of fact it would have to conform to it.

LAND BETWEEN FAIRFAX AND POTOMAC MERIDIANS IS ONE ENTIRE AND INDIVISIBLE TRACT.

So far as this case is concerned, and as between the parties hereto, we respectfully submit that this Honorable Court, will consider and regard all the land in the disputed territory all the way to the Potomac Meridian on the west and between the Potomac River on the south, and the Mason and Dixon Line on the north, as one entire and indivisible tract of land belonging to the territory and domain of either the Plaintiff or Defendant, as the Court may find from the evidence in the cause. This view of the tract in dispute is obviously a necessity by reason of the controversy as pertaining to the whole of the western boundary between the two States. The question of title, therefore, between the two States inherently and intrinsically relates to and involves a single tract.

Upon this proposition and in accordance with this theory the Plaintiff has based all of its surveys and locations west of the Fairfax Meridian. As the Defendant, the Plaintiff now points to the undoubted and indisputable fact that there exists in its favor a clear, well-defined and unanswerable claim of mixed possession of the territory embraced within the outlines of such entire and indivisible tract of land as above described.

On the 15th day of February, 1786, the State of Maryland granted unto Francis Deakins the tract of land called Elder Spring, located by actual survey and shown upon the plats of the Plaintiff. This grantee was the same Francis Deakins who, in the following year, located the Military Lots for the State of Maryland.

By reference to the plats it will be seen that the Fairfax Meridian practically bisects the Elder Spring grant, and that all that part of said tract lying west of said meridian is within and constitutes a part of the entire tract of territory above defined.

It therefore follows that if the Plaintiff can show that the patentee of such tract and those claiming under him can refer their holding and possession to the title derived from the State of Maryland, an unassailable case of mixed possession will be made out.

"When two are in mixed possession of the same tract of land, the law considers him having the title as in possession to the extent of his rights."

Cheney vs. Ringgold, 2 H. & J. 94.

Let us examine into the fact of the possession of the land within the boundaries of the tract called Elder Spring. This tract, as already stated, was granted by the State of Maryland to Francis Deakins by letters patent, bearing date, February 15th, 1786. By his last will and testament, duly of probate and record, in the office of the Register of Wills for the District of Columbia, and exhibited at page 724 of the Record, he devised said tract called Elder Spring to his nephew, John Hoye. John Hoye conveyed this tract *inter alia* to William W Hoye (see Record, page 729).

It appears that William W. Hoye subdivided this tract into lots and then conveyed the same to his grantees, to Daniel Raymond, 111 acres (see Record, page 731); to John Kelley, 50 acres (see Record, page 749); to James Ervin, 50 acres (see Record, page 762); to David Kelley, 200 acres (see Record, page 777). By these several deeds William W. Hoye co-granted and conveyed away the whole of the tract called Elder Spring, and his several grantees entered and took possession of the land contained in their respective deeds, and they, and those who hold and claim under them, are today in actual, undisturbed and undisputed possession of the said tract called Elder Spring. And the chain of title and the several mesne conveyances from Francis Deakins, the patentee, to the present tenant in possession are fully set forth in the Record at pages 724 to 786, both inclusive.

Neither the State of Virginia nor the State of West Virginia has ever undertaken to grant title to any of the land within the boundaries of the said tract called Elder Spring, but on the contrary, in making the Henry Deal 367 and 328 acre grants, and the Deakins 500-acre grant, which lie contiguous to Elder Spring, the State of West Virginia called for the lines of the said Maryland tract as shown in the description of the said tracts of land hereinbefore referred to.

The Plaintiff's location of Elder Spring is not disputed, and its relation to the Fairfax Meridian is correctly shown upon the plats of the Plaintiff.

Applying the facts as they exist in this case with Maryland in exclusive possession through its tenants in possession by deed of the land contained within the lines of the Elder Spring grant, and with title according to the call of the Charter to all of the land east of the Potomac Meridian, and West Virginia claiming title by possession only to the greater part of the land comprising the territory between the Fairfax and Potomac Meridians, and the same rule of decision applying in a question of boundary between States as is applicable to a question of boundary between separate tracts of land, it at once becomes apparent and the conclusion irresistibly follows that the claim of West Virginia to title by adverse possession must fall to the ground.

The possession of Maryland being a fact beyond the possibility of dispute as to a portion of the land lying between the Fairfax and Potomac Meridians, the Statute of Limitations, if the same were applicable to a question of this character, would have no part or place in the decision of this case, for, where there is a joint possession by the legal owner and claimant by possession at any time within the statutory period, the running of the Statute will be arrested.

Lowell vs. Stephens, 2 McCrary, 311.

In the case of Henderson vs. Griffin, 5 Peters, 151, this Court announced it as settled law

"that an entry on the land by one having the right has the same effect in arresting the progress of the Limitations as a suit."

In the case of Hall vs. Powell, 4 Sergeant and Rawle, 456, the Supreme Court of Pennsylvania said:

"There would appear to be no clearer principle of reason and of justice than this: that if the rightful owner is in actual occupancy of a part of his tract by himself, or by tenants, he is in the constructive and legal possession and seisin of the whole."

And in the case of Barr vs. Gratz's Heirs, 4 Wheaton, page 223, this Court said:

"Where two persons are in possession of land at the same time under different titles, the law adjudges him to have the seisin of the estate who has the better title. Both cannot be seised, and, therefore, the seisin follows the title."

And in the case of Deputron vs. Young, 134 U. S., page 225, this Court said:

"Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession; and where the possession is mixed, the legal seisin is according to the legal title."

And in the case of Hunnicutt vs. Peytor, 102 U. S. 333, this Court said:

"If two persons have possession of land, the one who has title to the land will have seisin also. Possession must be exclusive. This cannot be the case when the possession is joint with that of the owner, but when persons are thus in possession, the seisin belongs to the one who holds the title."

Applying this line of reasoning to the questions at issue in this cause, it follows that the State of Maryland must, in the eyes of the law, be held to be in constructive and legal possession and seisin of the whole of the territory lying between any line which may be set up by West Virginia upon the east and the Potomac Meridian.

In addition to what has been before said regarding the recognition by Virginia of Maryland's rights within the disputed territory by referring to patents issued by Maryland to land within that territory, there is other evidence in the Record in this case which shows that Maryland has been actually in possession of a substantial part of this territory.

Before taking up this evidence we desire to direct the Court's attention to the following passage from the answer of the Defendant:

> "It will thus be seen that between the Michler line of 1859 and the Deakins line of 1788, there is a triangular-shaped strip of land having its apex at the Fairfax Stone and its base three-quarters of a mile in length on the Pennsylvania line and an altitude of seven miles. The State of Virginia has granted patents for the lands on the west of the old Deakins line, and those claiming under these Virginia patents have held up to the Deakins line. After the Michler line was run and marked the citizens of Maryland began to claim the right in some instances to extend their holdings up to the Michler line, and in others to take up the land between said Deakins and Michler line. This has led to many disputes and to some serious conflicts and litigation, as Lieut. Michler predicted it would. Ever since said Michler line was run and marked as aforesaid, the State and people of Maryland have claimed and insisted that it was the true boundary line between the States."

We cite this for the purpose of showing that Maryland has never acquiesced in any pretension that Deakins line is a boundary line, and that within the disputed territory, *i. e.*, the territory between what is claimed as the Deakins Line and the Potomac Meridian, Maryland has been in part possession of that territory, and that therefore no acquiescence in an adverse holding can be made out. We are perfectly frank to say that the larger part of Maryland's possession within the disputed territory has only extended up to the Michler Line, but if the alleged Deakins "line" is claimed as the true boundary of West Virginia it would seem clear that any holding or possession by Maryland to any point beyond that line is sufficient to overcome any contention that she has acquiesced in an infringement upon her Charter rights. We again reiterate the proposition that the action of the States of Virginia, West Virginia and Maryland with reference to the western boundary of Maryland, in always regarding it as an open and unsettled question, is of itself sufficient to preserve the rights of Maryland to the territory granted under its Charter. We respectfully and earnestly urge that this is the law and also the justice of this case.

The Plaintiff has also located by actual survey upon the ground certain lines of the tracts of land called "Siege of Acre Resurveyed," "Troas Resurveyed" and "White Rock." "Siege of Acre Resurveyed" was granted by the State of Maryland on the 22nd day of April, 1887, and a copy of the patent for the same is exhibited at page 880 in the Record, and calls to run with the line marked "Fairfax Meridian" upon the plat.

"Troas Resurveyed" was granted by the State of Maryland on the 22nd day of January, 1896, and also calls to run with said line.

"White Rock" was granted on the 23rd day of December, 1881, and calls to run with the Virginia line, and the sur

Plate No. 5.

PAGE BOUND VERTICAL IN BOOK

vey of this tract by actual location shows that the line called for is the "Fairfax Meridian."

In connection with the location of the said tract called "White Rock" the Plaintiff has also filed as an exhibit in this cause the record of a case in the Circuit Court for Garrett County, Maryland, the same being the case of the State of Maryland vs. Marshall Reckard, No. 11 Criminal Trials, May Term, 1887.

The offense charged against Reckard was an assault with intent to kill upon one Austin Brown, who was acting as constable in the Second Election District of Garrett County, Maryland, at the time.

A warrant was placed in Brown's hands for the arrest of Reckard, and while in the discharge of his duty the assault was committed. Reckard was apprehended and was presented and indicted in the Circuit Court for Garrett County.

At the trial, the traverser interposed a plea in abatement, alleging therein, that the offense with which he was charged was not committed within Garrett County, nor within the jurisdiction of said Court, but in the County of Preston in the State of West Virginia.

The point at which the assault was made upon Brown is shown upon the plat of the Plaintiff by a black circle and the black letters, W. R. within the lines of the tract of land called "White Rock," east of the Fairfax meridian.

The plea in abatement was overruled, and at the trial of the issue joined, the traverser offered three prayers all based upon the theory that the offense charged against him was not committed in Garrett County, Maryland, but was committed, if at all, in Preston County, West Virginia, which prayers were rejected, and the prayers of the State as modified and substituted, were granted, a transcript of the record of this case is exhibited at page 978 of the Record.

Reckard was found guilty and committed to jail in Garrett county, to serve the sentence imposed by the Court. The de-

cision of the Court and Jury in this case was in line with the constant assertion of sovereignty and jurisdiction by the State of Maryland and its Courts west of where the State of West Virginia has attempted to assert authority and jurisdiction, and is another instance of the fact that the State of Maryland has not acquisced in the claim of the Defendant, that the so-called "Deakins Line" marked and fixed her western boundary, and that upon every occasion where the title, dominion, sovereignty and jurisdiction of the State of Maryland has been called in question by the acts or the assertion of a claim of right on the part of the State of West Virginia, that she has been prompt to deny such claim, and has been active in asserting her rights in the premises, and in defending her citizens and their property from the unjust and inequitable invasion of her territory and jurisdiction by the State of West Virginia, the Defendant in this cause.

In the testimony of Parken Ashby pages 1086-1088 of the Record the witness testified that the part of the William Ashby 300-acre tract up to the Michler line is held under a Maryland title and that taxes are paid in Maryland upon that part.

Samuel Faulkner testified at pages 1150 and 1151 to 1154 of the Record that he owned a part of of the Elder Spring tract, paid taxes on it in Maryland and held it under a Maryland title. The location of this tract has been before discussed. See Plate 46.

The same witness also stated at page 1152 of the Record that about seven or eight years before testifying in this case he also owned another tract part of which lay between the Elder Spring tract and the Monroe line and that he held it under a Maryland title.

In the testimony of H. J. Frear, page 1620 of the Record, the witness said that as agent for the Preston Lumber and Coal Company he purchased timber up to the Michler line

upon a tract owned by D. E. Offutt, which witness understood was held under a Maryland title.

The same witness also testified that he purchased timber for the same company up to the Michler line upon the tract known as "Troas Resurveyed," and that this tract was held under a Maryland title (Record, page 1620).

Again, the same witness testified that he purchased timber upon tract known as "Covent Garden" up to the Michler line, and he understood this tract was held under a Maryland title (Record, page 1621).

In the testimony of Julius Monroe, at page 1724 of the Record, the witness testified that the "Mt Pleasant" tract, as he had located the same upon his plat, was held under a Maryland title.

We therefore respectfully submit that even as to possession alone Maryland stands before this Court with such a substantial holding within this territory as to preserve her right to the whole of it if her contention that under her Charter she is entitled to it prevails.

CONCLUSION.

From the aforegoing discussion we submit that it has been established:

I. That the true construction of the grant of territory of the Maryland Charter, as declared by all the authorities who have discussed it, calls for a meridian line running from the southern boundary of Pennsylvania to the first fountain or source of the Potomac River as the western boundary of Maryland; and for a line extending from said first fountain or source along the southern shore of bank of the Potomac River to the mouth thereof as the southwestern and southern boundary of the State.

II. That to adopt the Fairfax Stone as marking the source or first fountain of the Potomac River would defeat the calls of the Charter for the boundaries above mentioned.

III. That the North Fork of the Potomac River is clearly marked by irresistible evidence as the main stream of the Potomac River, and that the Potomac Spring, being the source of the said North Fork, is the first fountain of Potomac River.

IV. That, therefore, the western, southwestern and southern boundaries are properly ascertained by a meridian running from the Pennsylvania Line to the Potomac Spring, and thence by a line along the southern bank of the stream or river flowing from said Spring, to the mouth of said river.

V. That the controversy between Maryland and West Virginia as to the western and southwestern boundaries of the former having always been and being still an open, unsettled and pending question, the rights of Maryland to the boundaries called for by her Charter, as above set forth have not been forfeited or surrendered by her, and that this Honorable Court ought not to deprive her of them.

VI. That with respect to the tract in dispute between the two States growing out of the unsettled boundary line, Maryland has made such grants and patents of extensive lands within said tract, and has so been in possession of parts of said tract as to bar and defeat all possible pretensions upon the part of West Virginia to an adversary possession of said tract so in dispute.

VII. That the equity and justice of this case, reinforcing the law of it, sustain the claims of the State of Maryland.

Finally, the attention of the Court is called to the fact that the State of Maryland, in the spirit of sisterhood and union—the spirit which made the independence and greatness of this Nation possible—has already borne repeated deprivations of parts of her territory which have been added to the domain of circumjacent States. On the southeast her boundaries were compressed to the advantage of Virginia. On the east she lost what now forms much of the State of Delaware. On the north Pennsylvania was greatly aggrandizer at her expense. And at the southwest she has virtually surrendered the magnificent dominion between the North Branch and the South Branch of the Potomac River, and also a wide tract directly at the west, which now makes a goodly part of the territory of the defendant in this case.

Maryland's claim herein is an exceedingly limited and modest one. Having located by indisputable proofs the First Fountain of the Potomac River to be the Potomac Spring, as surveyed and ascertained upon her Plat in this case, she brings to the attention of this Court that that spring is only about a mile and five-eighths west of the meridian of the Fairfax Spring, and that, therefore, the ascertainment of the meridian of the Potomac Spring as the true boundary line here in question will secure to Maryland a strip of land immediately beyond the Fairfax or Michler Meridian, extending northward to Pennsylvania, and but a little over a mile and five-eighths in width.

With regard to such grants as may be held under West Virginia patents, this Honorable Court may rely upon the Justice of the State of Maryland as she may rely upon that

of any other State in the American Union. (See—Robinson vs. Minor, 10 Howard, 643-44.)

It would be universally felt by the people of the State that as McMahon declared, "it would be the duty of Maryland to confirm" subsisting grants; that "no attempts" should "be made to disturb titles so derived," and that "thus respecting and protecting private rights, her claim would be stripped of all its harshness, and, if successful, whilst it enlarges her territory, would be a monument of her Justice."

ISAAC LOBE STRAUS,
Attorney-General of Maryland.
EDWARD H. SINCELL,
WILLIAM L. RAWLS,
Counsel for the Plaintiff, the State of Maryland.

APPENDIX A.

Correspondence Concerning the Fairfax Stone.

From Frederick, Lord Baltimore's Institutions to Gov. Horatio Sharpe, 1753.

"Whereas, the Right Honorable Lord Viscount Fairfax has a grant of a large tract of land lying and running along the banks of Potowmack River on the Virginia side, and whereas I am informed the powers of government in Virginia have taken the liberty to ascertain the bounds and limits of his said Lordship's grant running along the banks of the said river, *which river, to the further banks thereof, is limited to me with its soil and water, and is a boundary between my Province of Maryland and the Province of Virginia unto the fountain head of the said river;* and whereas, I am informed that commissions have proceeded therein, and instead of their stopping at South Branch, which runs *from the first fountain* of Patowmack River, one of the boundaries of Maryland, have crossed to a branch running north, whereby their endavours are to give limits and boundary marks prescribed by my royal charter, subjecting me to great loss of country; and whereas it being not known to me that my predecessor was made a party to the settlement of such boundaries by the said commissioners; and were it so, such settlement would be invalid by virtue of my father's marriage-articles, he being only tenant for life, with reservation to me as tenant in tail; I therefore desire and require of you, as soon as possibly you can, to get intel-

ligence how such boundaries have been or are settled by the said commissioners with regard to Lord Fairfax and his grant; and at the same time, if opportunity serves you, you may communicate to Lord Fairfax that I am very desirous of settling proper limits conclusive between him and me in regard to my Province of Maryland and his grant in Virginia; and in the meantime you must make or have made a good look out, and warning given to such persons as shall venture to settle in such disputed boundary between my Province of Maryland and the Province of Virginia under the said grant to Lord Fairfax."

Sharpe to Fairfax.

Sept. 1753.

"Lord Baltimore was pleased to charge me with an inquiry into the true meridian and place of the fountain head of Patowmack. The best information I have been hitherto able to procure gives me reason to believe there has been a mistake in fixing the spring head to the North Branch, since the length, with other circumstances, more properly denotes the Southern Branch, commonly called Wappacomo, to be the main and principal course of that river. I am the more willing to be persuaded of the truth of this representation from the considerable advantage that will accrue to your Lordship. That branch, I am informed, has never been thoroughly explored and traced to its source; but I flatter myself with having your Lordship's concurrence for such an examination into its course, length, width, and depth as may bring this matter to a nearer degree of certainty; and if that should appear to be the fountain head of Patowmack River, I shall not question but your Lordship will be for taking such measures as may ascertain the mutual limits of the two proprietorships, agreeable to the direction and true intention of their respective charters."

Fairfax to Sharpe.

Frederick, *September 24th*, 1753.

"Sir: Yours I received by Mr. Young, by which I perceive Lord Baltimore designs to dispute with this Province, *which is the head spring* of Patowmack, the south or north branch as run out by the commissioners between his Majesty and me in the year 1736.

I am entirely (of the opinion?) that the South would be much to my advantage, and therefore think it improper for me to appear therein, and that the Governor of Virginia and your excellency should transact that affair. If his Lordship should obtain his demand, I must insist upon a new line between his Majesty and me to the Southward."

(See Record, pages 541-542.)

APPENDIX B.

CHAPTER 196.—An Act giving the consent of Congress to an agreement or compact entered into between the States of Virginia and Maryland respecting the boundary between said States.

Whereas arbitrators duly appointed on the part of the State of Virginia and on the part of the State of Maryland for the purpose of ascertaining and fixing the boundary between the States of Virginia and Maryland, did proceed in the premises to examine into and ascertain the true line of said boundary, and did award as to the same in words following, to-wit:

"AWARD.

"And now, to-wit, January sixteenth, anno Domini eighteen hundred and seventy-seven, the undersigned, being a majority of the arbitrators to whom the States of Virginia and Maryland, by acts of their respective Legislatures, submitted the controversies concerning their territorial limits, with authority to ascertain and determine the true line of boundary between them, having heard the allegations of said States, and examined the proofs on both sides, do find, declare, award, ascertain, and determine that the true line of boundary between the said States, so far as they are conterminous with one another, is as follows, to-wit:

"Beginning at the point on the Potomac river where the line between Virginia and West Virginia strikes the said river at low water mark, and thence, following the meanderings of said river, by the low-water mark, to Smith's Point, at or near the mouth of the Potomac, in the latitude thirty-seven degrees, fifty-three minutes, eight seconds, and longitude seventy-six degrees, thirteen minutes, forty-six seconds;

thence crossing the waters of the Chesapeake bay by a line running north sixty-five degrees thirty minutes east, about nine and a half nautical miles, to a point on the western shore of Smith's Island, at the North End of Sassafas Hammock, in latitude thirty-seven degrees, fifty-seven minutes, thirteen seconds, longitude seventy-six degrees, two minutes, fifty-two seconds; thence across Smith's Island south eighty-eight degrees, thirty minutes, east, five thousand six hundred and twenty yards to the center of Horse Hammock, on the eastern shore of Smith's Island, in latitude thirty-seven degrees, fifty-seven minutes, eight seconds, longitude seventy-five degrees, fifty-nine minutes, twenty seconds; thence south seventy-nine degrees thirty minutes east four thousand eight hundred and eighty yards to a point marked A on the accompanying map, in the middle of Tangier sound, in latitude thirty-seven degrees fifty-six minutes forty-two seconds, longitude seventy-five degrees fifty-six minutes twenty-three seconds, said point bearing from Janes Island light south fifty-four degrees west, and distant from that light three thousand five hundred and sixty yards; thence south ten degrees thirty minutes west, four thousand seven hundred and forty yards, by a line dividing the waters of Tangier Sound, to a point where it intersects the straight line from Smith's Point to Watkin's Point, said point of intersection being in latitude thirty-seven degrees fifty-four minutes twenty-one seconds, longitude seventy-five degrees fifty-six minutes fifty-five seconds, bearing from Jane's Island light south twenty-nine degrees west, and from Horse Hammock south thirty-four degrees thirty minutes east; this point of intersection is marked B on the accompanying map; thence north eighty-five degrees fifteen minutes east, six thousand seven hundred and twenty yards along the line above mentioned, which runs from Smith's Point to Watkin's Point until it reaches the latter spot, namely, Watkin's Point, which is in latitude thirty-

seven degrees fifty-four minutes thirty-eight seconds, longitude seventy-five degrees fifty-two minutes forty-four seconds; from Watkin's Point the boundary line runs due east seven thousand eight hundred and eighty yards, to a point where it meets a line running through the middle of Pocomoke Sound, which is marked C on the accompanying map, and is in latitude thirty-seven degrees fifty-four minutes thirty-eight seconds, longitude seventy-five degrees forty-seven minutes fifty seconds; thence by a line dividing the waters of Pocomoke Sound, north forty-seven degrees thirty minutes east, five thousand two hundred and twenty yards, to a point in said sound marked D on the accompanying map in latitude thirty-seven degrees fifty-six minutes twenty-five seconds, longitude seventy-five degrees forty-five minutes twenty-six seconds; thence following the middle of the Pocomoke river by a line of irregular curves, as laid down on the accompanying map, until it intersects the westward protraction of the boundary line marked by Scarborough and Calvert, May twenty-eighth, eighteen hundred and sixty-eight, at a point in the middle of the Pocomoke river and in the latitude thirty-seven degrees fifty-nine minutes thirty-seven seconds, longitude seventy-five degrees thirty-seven minutes four seconds; thence by the Scarborough and Calvert line, which runs five degrees fifteen minutes north of east, to the Atlantic ocean; the latitudes, longitudes, courses and distances here given have been measured upon the Coast Chart, number thirty-three, of the United States Coast Survey (sheet number three, Chesapeake bay) which is herewith filed as part of this award and explanatory thereof; the original charter line is marked upon the said map and shaded in blue; the present line of boundary, as ascertained and determined, is also marked and shaded in red, while the yellow indicates the line referred to in the compact of seventeen hundred and eighty-five, between Smith's Point and Watkin's Point; and in further explana-

tion of this award, the arbitrators deem it proper to add that—

"*First.* The measurements being taken and places fixed according to the Coast Survey, we have come as near to perfect mathematical accuracy as in the nature of things is possible; but in case of any inaccuracy in the described course or length of a line or in the latitude or longitude of a place, the natural objects called for must govern.

"*Second.* The middle thread of Pocomoke river is equidistant as nearly as may be between the two shores without considering arms, inlets, creeks, or affluents as part of the river, but measuring the shore lines from headland to headland.

"*Third.* The low-water mark on the Potomac to which Virginia has a right in the soil, is to be measured by the same rule, that is to say, from low-water mark at one headland to low-water mark at another, without following indentations, bays, creeks, inlets, or affluent rivers.

"*Fourth.* Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

In testimony whereof we have hereunto set our hands the day and year aforesaid.

"J. S. BLACK,
"Of Pennsylvania.

"CHAS. J. JENKINS,
"Of Georgia.

"A. W. GRAHAM,
"Secretary."

And whereas the said award has been ratified and confirmed by the Legislatures of the States of Virginia and Maryland, respectively;

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the said agreement or award, and to each and every part and article thereof; provided, that nothing therein contained shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which form the subject of the said agreement or award.

Approved March 3, 1879.

APPENDIX C.

The Western Boundary Survey of Maryland.

A Final Report of the Astronomical and Magnetic Work Done in 1897.

With Nine Plates.

By L. A. Bauer, Astronomer and Magnetician.

Introduction.

In August, 1897, the Maryland Geological Survey was requested by the Attorney General of the State, at that time, the Honorable H. M. Clabaugh, to take charge of the astronomical and magnetic work of the survey for the determination of the western boundary of the State. The State geologist, Dr. W. B. Clark, detailed me to undertake this important work and instructed me to report to the superintendent of the survey, Mr. E. H. Sincell.

My instructions from the superintendent of the survey, regarding my duties as astronomer and magnetician to the survey, consisted in the proper execution of the following work:

A. The verification of the Michler Meridian Line, which started at the Fairfax Stone and which was run in 1859-60, in accordance with a joint resolution passed by the legislatures of Maryland and Virginia. The Meridian line will be termed in this report, the "Fairfax Meridian."

B. The determination and tracing of a new Meridian line starting at the Potomac Stone, planted by the surveyor-in-charge, Mr. W. McCulloh Brown, in 1897. This stone, according to Mr. Brown, marks the most westerly source of

the North branch of the Potomac. This second meridian line will be called the "Potomac Meridian."

C. The determination of the magnetic elements at as many points as possible along the line of survey.

These instructions were carried out between August 16th and October 16th, 1897, with the co-operation of the Maryland Geological Survey and of the United States Coast and Geodetic Survey. The State Geologist, Professor William Bullock Clark, courteously permitted me to temporarily discontinue the magnetic work of the State Geological Survey, which he had assigned to me, so that I might be able to give my entire time and attention to the Western Boundary Survey. He furthermore gave me the use of all astronomical and magnetic instruments loaned to the State Geological Survey by the United States Coast and Geodetic Survey and likewise assigned Mr. A. C. McLaughlin as geologist to the Boundary Survey party. The Coast and Geodetic Survey readily consented to exchange the small four and a half inch astronomical theodolite loaned to the Geological Survey, and used in the magnetic work, for a larger theodolite, one better adapted to the work of the Boundary Survey. They accordingly put at my disposal one of their new eight-inch direction theodolites, which read with the aid of micrometer microscopes to two seconds and by estimation to one-fifth of a second. But for this timely and important assistance rendered by the Maryland Geological Survey and the United States Coast and Geodetic Survey, the astronomical and magnetic work of the Western Boundary Survey could not have been executed so well or with such precision. Acknowledgment of this service is made herewith to the State Geologist and to the superintendent of the Coast and Geodetic Survey.

I also wish to express my appreciation of the encouragement and assistance given throughout the work by the superintendent of the Boundary Survey, Mr. E. H. Sincell, and

by the surveyor in charge, Mr. W. McCulloh Brown. Mr. Brown evinced most commendable zeal and enthusiasm in the establisment of points on the new Meridian Line between those fixed by me on the distant mountain tops.

He performed his task as faithfully and as accurately as the instruments at his disposal would permit. Every suggestion relating to the proper and accurate performance of the work was readily entertained and warmly seconded by Mr. Sincell.

Mention should also be made of the faithful and devoted service rendered me by my assistants, Messrs. A. S. Abernathy, Charles Ashby and Ralph Ashby.

A word should be added with regard to the conditions under which the work had to be executed, so that an intelligent criticism can be made of it.

Both meridian lines are situated in a region but sparsely inhabited and run through dense forests and thick undergrowth, over high mountains and fog-laden glades. Camps had to be established at suitable intervals and provisions brought by wagon from Oakland over the mountain roads.

As my own camp had generally to be located on mountain tops, inaccessible to wagons, instruments, camp equipage and provisions had to be transported by hand. The safe and rapid transportation of the delicate instruments from mountain top to mountain top was always a source of great anxiety, as the slightest mishap would have caused considerable delay. The prevalent atmospheric conditions, the state of the atmosphere being very unsteady and hazy during the day and raising fogs at night, made the procuring of long sights a trying and difficult matter within the extremely limited time at my disposal. I was due at the University of Cincinnati within two months after the actual determination of the meridians had been begun and there were two meridian lines, each 35-36 miles long, to determine and

trace out, besides the making of magnetic observations. As no skilled assistance was available, I had to do all the observing and computing, and such methods had to be adopted in the location of the lines as would make me as independent as possible of such assistants as had to be temporarily pressed into service. During the first part of the work there was considerable wet weather, and during the latter part extensive forest fires filled the air with a dense smoke. The opening of the lines through the thick woods covering the mountain tops required, at times, heavy cuttings and thus caused vexatious delays. I traced the two meridian lines simultaneously and reached Mason and Dixon's line on October 15th, two months after my first camp. The next morning was spent in making magnetic observations, which I barely finished in time to make connections for the train to Cincinnati, arriving in Cincinnati Sunday morning and assuming my duties at the University the next day.

Instruments.

The following instrumental outfit, belonging to the United States Coast and Geodetic Survey, and temporarily loaned to the Maryland Geological Survey, was at my disposal:

Eight-inch Direction Theodolite, No. 132, and Stand.
Mean Time Chronometer, Dent 2256.
Magnetometer No. 18, and Stand.
Dip Circle 56/4440, and Stand.
Fifty-foot Steel Tape No. 86.

The special observing tent was loaned by the Maryland Geological Survey, and two specially constructed heliotropes were purchased by the Boundary Survey.

The following data concerning eight-inch theodolite No. 132 was furnished by the superintendent of the Coast and Geodetic Survey:

Circle: Diameter 20 cm.; graduated to 10′ spaces, numbers increasing from right to left.

Telescope: Focal length 42.5 cm.; clear aperture 44.2 mm., two eyepieces, magnifying power of telescope with low power eye-piece, 23.6 diameters with high power eye-piece, 52 diameters.

Micrometers: single achromatic objectives, eye-pieces of 25 mm. equivalent focus, magnifying power of system about 45 diameters, 1 division of micrometer head = 2″.

Stride Level: 125 mm. x 15.5 mm. chambered vial, marked 7.4″.5 "K & E" 1 division = 2 mm. 4″.424 at 23°, C.

The Verification of the Michler Meridian Line—The Fairfax Meridian.

After careful deliberation, it was decided to make the Backbone mountain, the highest mountain along the line, and distant about three miles from the Fairfax Stone,* the principal station of the survey. That is, the astronomical direction of the meridian line was re-determined on the Backbone Mountain and then extended backward to the Fairfax Stone and forward to the Mason and Dixon line, the corrections of the Michler monuments being obtained on the line thus extended. In this way a straight line was traced out and any errors that may be due to local deflection of the plumb line were reduced to a minimum.

After determining approximately for Mr. Brown the direction of the meridian lines at the initial points of the two lines—the Fairfax Stone and the Potomac Stone, and after making some magnetic observations at the Fairfax Stone, I moved my camp to the Backbone Mountain on Wednesday,

*The original Fairfax Stone has disappeared since 1859, when Michler made his survey. The instrument pier, however, which Michler states he put directly back of the Fairfax Stone and which was afterwards built up in the form of a monument, was easily found and indentified.

August 18th, and made the necessary preparations for the determination of the meridian line. According to a copy of a manuscript report by Lieutenant Michler and Commissioner Lee, in Mr. Sincell's possession, the Backbone monument was 23.5 inches west of the meridian line passing through the Fairfax Stone. I accordingly selected my station at this distance east of the middle line of the base of the monument, and, for the convenience in observing, 7.28 feet north of the front face of the monument. Owing to the rains and fogs it took several nights before a satisfactory determination of the meridian line was obtained. The astronomical observations were made on Polaris, near eastern elongation, local mean time being obtained with sufficient accuracy by solar observations with the theodolite attachment of the magnetometer on the day previous and subsequent to the astronomical observations. The instrument used was the eight-inch theodolite, and the star was observed in five different positions of the circle in order to eliminate graduation errors as far as possible.

In each position two readings were taken on the mark with telescope direct, then two readings on the star and level readings with telescope direct; next two readings on star and level readings with telescope reversed; and finally, two readings on mark, telescope reversed, thus completing one set. The principal azimuth mark was on Sell's Hill, nearly two miles to the west, and consisted of a lantern enclosed in a box and shining through a half-inch hole. A secondary azimuth mark had been erected on Dawson Hill by Mr. Brown, about five miles to the north, and consisted of a bull's eye lantern enclosed in a box, the aperture of the box being about 1½-inch. On account of the prevalent fogs in the intervening glade, this light could not be utilized very often. Observations were made on three nights and the probable error of the resulting azimuth was 0. ″90. The determination of the astronomical direction was therefore a satisfactory one.

The next step was to ascertain whether the visible points of the Michler Line—the Fairfax Stone, three miles south, and the Lower* Hill monument, nine miles north—were in the meridian line as now determined.†

To this end careful and elaborate horizontal readings were taken between these two points and my azimuth marks. The angle in each case was determined in five positions of the circle and in order to vary the conditions, observations were made on lanterns at night and on poles during the day. The mean result of each angle consisted of at least 20 separate readings on the horizontal circle of the eight-inch theodolite. The final result of this work was that the Fairfax Stone was precisely in line with the meridian as re-determined. Thus far the Michler Meridian Line and my own coincided perfectly. The lower Hill Pole, which had been planted in the Michler Line by applying the corrections given in the manuscript report alluded to above, was found to be 15.2 seconds or 3.52 of a foot too far east. The Michler Monument on Lower Hill, consisting originally simply of a mound of earth and stones around a stake, and the stake having now rotted away, it was not, of course, possible to determine the Michler line precisely at this point. However, the mound and stones were still there, and likewise the hole where the stake had been. The entire mound was clearly to the east of my line. To mark my point permanently I planted a large stone, projecting above the ground about a foot, and marked the station by a copper bolt sunk in the top of the stone. This is the only monument that I planted on the Michler line, thereafter locating my points with reference to the established Michler monuments.

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* Spelled in Lieutenant Michler's Report as Lauer.

† Snaggy Mountain is likewise visible from Backbone Mountain, but owing to the unsatisfactory atmospheric conditions prevailing at the time, it was decided not to attempt getting this point from the Backbone station.

By backsighting on the Backbone signal from Lower Hill, I prolonged my line to Snaggy Mountain and again found the Michler line was a trifle east. In the prolongation of the line, I did not use the ordinary method of the engineers, viz: that of backsights and foresights, but instead used a method far more satisfactory under the existing conditions, viz: that of measuring the angle between my backsight and foresight, which had been set approximately in line by one of my assistants, generally Mr. Charles Ashby, who displayed considerable skill in this work. The angle was measured in five positions of the circle for primary points or stations and three for intermediate points, four readings being taken in each position, two with telescope direct and two with telescope reversed. With the aid of the approximate distance of the fore signal from the station, the correction to be applied to put it in line was easily obtained. This method I found the most expeditious one under the circumstances and it made me practically independent of skilled or trained assistants. In most cases the angle was determined by observations at night on lanterns enclosed in boxes with suitable apertures. During the day the line would be approximately traced and cleared and finally located at night. The entire line was traversed from five stations, Backbone Mountain, Lower Hill, Snaggy Mountain, Fike's Hill and Sickle's Hill. The longest sight was $9\frac{1}{4}$ miles. It is possible from Snaggy Mountain to see south as far as Backbone Mountain, $17\frac{1}{4}$ miles away, and north Fike's Hill, $6\frac{1}{2}$ miles.

At Snaggy Mountain, on September 28th, I redetermined the meridian line.

As the Michler meridian and mine differed by nearly seven feet at Snaggy Mountain, I decided to check my line by new azimuth observations. I accordingly, on the night of the 28th of September, made the necessary astronomical observations, using the same instruments and methods as at the Backbone

Station. Four results were obtained, the mean having a probable error of about 1.2″. The azimuth of my pole on Fike's Hill, 6½ miles north of Snaggy, as obtained from the prolongation of the meridian determined at the Backbone, differed from that determined from the star observations at Snaggy Mountain by 5″, or, in other words, the meridian line prolonged from the meridian to Fike's Hill, 23¾ miles, was only 0.84 of a foot, and east from that freshly determined at Snaggy Mountain and prolonged to Fike's Hill. Not knowing how much of this apparent difference must be ascribed to local deflections of the plumb line, which may be expected in this region, it was decided not to make any change, but to prolong the Backbone meridian to the intersection of the Pennsylvania line.

Further details need not be given in this report, as they can be obtained from the field notes. It will be sufficient for me to present a table giving the distance apart between the Michler line and mine at various points along the line. It should be remarked that none of the Michler monuments, according to the MS. report, alluded to above, are precisely in the meridian line through the Fairfax stone, the monuments serving originally simply as piers for Lieutenant Michler's instruments. Michler gives in his report the corrections to each monument, but these corrections do not correspond with those in his field books, nor does it appear from a casual inspection of the field notes, how the corrections given in the MS. report have arisen. It is quite possible that a careful revision of the field notes will explain these differences, as given below. For the present, corrections as given in the report have been adopted.

For all practical purposes the Michler line may be regarded as having been sufficiently checked and as being a true north and south line passing through the Fairfax stone.

TABLE

Showing Distance Apart Between the Michler Meridian Line and the Bauer Meridian Line at Various Points.

Station.	Distance from Fairfax Stone. Miles.	Michler line east of his monuments.* Inches.	Michler line east of Bauer line. Feet.
Fairfax Stone . .	0.00	0.00	0.00
Backbone Mountain .	2.9	23.5	0.00
Lower Hill . . .	11.9	8.7	3.44
Snaggy Mountain .	20.2	0.0	6.88
Fike Hill . . .	26.7	7.6	8.93
Mason & Dixon Line .	36.3	28.8	13.25

The departure between the two lines amounts to about $4\frac{1}{2}$ inches per mile.

THE MERIDIAN LINE STARTING AT POTOMAC STONE—THE POTOMAC MERIDIAN.

The principal station for this line was selected on top of the Backbone Mountain 495.9 feet north of the Potomac Stone, the same methods being employed for determining and prolonging the meridian line as already detailed in the previous pages. The two meridian lines were pushed along together. For example, after getting through on the Michler Line at Backbone Mountain, I moved my camp over to the Potomac Stone and got the new line started as far as Foley Mountain, 9 miles distant. Then I proceeded to Rembold Hill and determined the distance apart between the two lines—the Fairfax and the Potomac Meridians. I pitched my next camp on Foley Mountain and prolonged the new meridian line to Taylor's Hill, 11 miles. The next camp was at Lower Hill on the Fairfax Meridian. I proceeded thus until I reached the Mason and Dixon Line.

* As given in Lee's MS. Report, a copy of which, as stated above, is in possession of Mr. Sincell.

As the new line was determined for the first time, its tracing out was a little more difficult than that of the Fairfax Line. The general method pursued was to send Mr. Charles Ashby ahead to some distant mountain, 8-10 miles away, telling him approximately where the line was going to cut. After reaching this point, he would climb a tree and give me a sunflash by holding a small mirror in the proper position. He, in turn, would get signals from me, according to a fixed code, and would thus be put as nearly in line as possible. After getting the line cleared, he would erect a signal for day and for night observations and then I would make the necessary measurements for ascertaining how far the signal was out from the meridian line.

At Taylor's Hill, after having traced the meridian line 20 miles from the beginning, I tested its correctness by observations on Polaris, near eastern elongation on the night of October 1, and found it to be correct within 1.2 seconds, or, in other words practically perfect.

No correction was necessary and the line prolonged to Fike's Hill, 3.7 miles away. From Fike's the line was extended to Roderhaeuer's Hill $3\frac{1}{3}$ miles and from thence to Robinson's 5 miles.

Owing to lack of time this was my last station on the Potomac Meridian Line, it being within a short distance of the Mason and Dixon Line. Mr. Brown carefully prolonged the line to its terminus.

Distance Between the Two Meridian Lines.

From observations made on Rembold Hill (Potomac Meridian), and the Backbone mountain (Fairfax Meridian), it was found that the perpendicular distance* between the two lines at Rembold Hill is 5,977.1 feet, $1\frac{1}{8}$ miles approximately.

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*As the two meridian lines are so close to each other, the perpendicular distance between them may be regarded as the distance along a parallel of latitude.

As the two lines are true north and south lines, they will continue to approach each other, and in the present case at the rate of nearly 1 foot per mile.* This will make the distance between the two lines at the Potomac Stone, 5981.1 feet, and at Mason and Dixon Line, 5938.7 feet, or about 42 feet less at the terminus of the line than at its origin.

Mr. Brown found by actual measurement that the distance at Mason and Dixon Line, between the two lines traced by me was 5940.3 feet, thus differing 1.6 of a foot from the computed distance. This is a most satisfactory check upon both of my lines. The Surveyor for West Virginia tested my line at a point 23½ miles from the Potomac Stone by triangulating across from the Fairfax meridian, as determined by me, to the Potomac meridian. The distance obtained thus by him differed from that computed on the assumption that my lines were true meridians, but 3.4 feet.

Approximate Longitude of the Potomac Meridan Line.

Assuming that the longitude of the Michler Line as determined by himself, is 79° 29′ 10.6″ west of Greenwich and knowing the distance between the two meridian lines, as given above, I find that the longitude of the Potomac Meridian Line is,

79° 30′ 26.6″ W. of Greenwich
2° 27′ 27″ W. of Washington, or
$0^h\ 09^m\ 49^s\ 8$.

Approximate Latitude of the Potomac Stone.

With the aid of the distance north of the Backbone Monument from the Fairfax Stone, as determined by Michler, and having determined by triangulation between Rambold Hill and the Backbone Monument, that my Rembold Station was

*The angle of convergence of the two meridians may be taken as the same along the entire line and amounts to 48″ and hence the two lines converge at the rate of 1.23 foot per mile.

9,838 feet north of the Backbone Monument, and next, knowing the distance of the Rembold Station from the Potomac Stone, as determined by Mr. Brown, I obtained for the latitude of the Potomac Stone

39° 12′ 44″

as based upon Michler's determinations of the latitude of the Fairfax Stone, viz:

39° 11′ 32.5″.*

The Potomac Stone is about 7,200 ($1\frac{1}{3}$ miles) north and 5,981 feet ($1\frac{1}{8}$ miles) east of the Fairfax Stone and bears about 39.7° W. of N.

(From circum-meridian altitudes of the sun on August 16th, 1897, with the small $4\frac{1}{2}$-inch theodolite, I found the approximate latitude of the Potomac Stone to be 39° 13.0′.)

The latitude of the Mason and Dixon Line, according to observations in 1883, by Mr. Sinclair, of the U. S. Coast and Geodetic Survey, is 39° 43′ 18″.

Total Length of the Lines.

Fairfaix Meridian Line: 36.35 miles, as measured by Michler.

Potomac Meridian Line: 34.67 miles, as measured by Brown.

Magnetic Observations.

Complete magnetic observations were made at Fairfax stone, Camp Fairfax, Backbone Mountain, Foley's Mountain, Lower Hill, Snaggy Mountain, Taylor's Hill and Fike's Hill, on both lines, and at intersection of Fairfax meridian with Mason and Dixon's line. The values of the magnetic declination are given below.

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* As given in Lee's Report alluded to above.

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Magnetic Declinations Observed in 1897 by L. A. Bauer, with the Coast and Geodetic Survey Magnetometer No. 18, and at the Expense of the Western Boundary Survey.

Station.	Latitude.	Longitude.	Date of Observation.	Magnetic declination * for Oct. 1, 1897	Magnetic declination * for Jan. 1, 1900.	Location.	
Fairfax Stone A	39° 11.6′	79° 29.2′	1897, Aug. 4 and 6	3° 09.6′ W.	3° 16.4′ W.	At the Stone	Fairfax Meridian.
" Stone B	39 11.7	79 29.2	" Aug. 5 and 6	3 05.6	3 12.4	403 feet North	
Camp Fairfax	39 12.7	79 29.0	" Aug. 7 and 8	3 06.2	3 13.0	Flynn's Farm	
Backbone Mountain	39 14.1	79 29.3	" Aug. 22, 23 and 28	3 07.2	3 14.0	Michler Mon	
Lowe Hill	39 21.9	79 29.2	" Sept. 25	3 16.7	3 23.5	Bauer's Stone	
Snaggy Mountain	39 29.1	79 29.2	" Sept. 28 and 29	3 37.2	3 44.0	Michler Mon	
Fike's Hill	39 34.7	79 29.2	" Oct. 8	3 40.2	3 47.0	" "	
Mason and Dixon Line	39 43.3	79 29.2	" Oct. 16	3 47.3	3 54.1	273 feet North of Michler Mon.	
Foley's Mountain	39 20.8	79 30.4	" Sept. 16 and 21	3 16.0	3 22.8	Bauer's Streets	
Taylor's Hill	39 30.0	79 30.4	" Sept. 30 and Oct. 1	3 31.7	3 38.5	Bauer's Station	
Fike's Hill	39 33.9	79 30.4	" Oct. 13	3 40.3 W.	3 47.1 W.	" "	Potomac Meridian.

(For Isogenic May, see Plate VIII.)

* The declinations given are the mean values for the entire day of 24 hours. October 1, 1897, is about the middle date of the survey.

Magnetic Declinations Observed from 1896-'99 by L. A. Bauer in Garrett County with the Coast and Geodetic Survey Magnetometer No. 18, and at the expense of the Maryland Geological Survey and the Coast and Geodetic Survey.

Station.	Latitude.	Longitude. W. of Gr.	Date of Observation.	Magnetic declination for Oct. 1, 1897, and	Magnetic declination for Jan. 1, 1900.	Location.
Corunna	39° 16.6′	79° 22.6′	1897, July 31	3° 16.7′ W.	3° 23.5′ W.	S. M. Stone Court House.
Oakland	39 24.6	79 24.6	1896, 1897 and 1899	3 22.0	3 28.8	Brown's N. M. Stone.
McHenry	39 33.4	79 21.2	1899, June 6	3 31.2	3 38.0	
Swanton	39 27.0	79 12.3	1899, June 9	3 31.5	3 38.3	
Accident	39 37.6	79 19.0	1899, June 6	3 39.7	3 46.5	
Grantsville	39 41.6	79 09.1	1899, June 7	3 53.3	4 00.1	
New Germany	39 37.9	79 07.2	1899, June 8	3 53.9	4 00.7	

(This table is supplied with the permission of the State Geologist and the Superintendent of the Coast and Geodetic Survey.)

Plate I.

Here follows photograph, marked: "View showing the east side of the Michler Monument, placed behind the Fairfax Stone in 1859 as it appeared in 1898. It will be noticed that the monument between 1898 and 1899 had been tampered with."

Plate II.

Here follows photograph, marked: "View showing the east side of the Michler Monument placed directly behind the Fairfax Stone in 1859, as it appeared in Augnst, 1899. The pole to the left of the monument, *i.* e., on the south side of it, is the one sighted on from the Backbone Mountain in verifying the Michler line in 1897.

This view also shows the disappearance of the original Fairfax Stone planted in 1765-66. According to the description in Lieutenant Michler's report, the original Fairfax Stone was directly in front of the monument shown above, *i. e.*, on the south side (right-hand side.)"

Plate III.

Here follows photograph marked: "The Potomac river at the point where the Fairfax line crosses, three-fourths of a mile north of Fairfax Stone. The man has hand on line stake and is looking north along the line."

"This shows that a good-sized stream flows from the west towards the east. It would be impossible to comply with the Acts of the Maryland and Virginia Assemblies passed in 1852 and 1858 that the line is to begin at the Fairfax Stone and that part of the Maryland charter terminating the western boundary at the 'further bank' of the Potomac."

Plate IV.

Here follows the photograph marked: "View showing the Michler Monument on the Backbone Mountain as it appeared in August, 1899, similar monuments are at N. W. Virginia turnpike, Snaggy Mountain, Fike's Hill and at intersection of line with Pennsylvania line. The pole marks the site of L. A. Bauer's astronomical station of 1897. This point and the Fairfax pole were found to be exactly in the true meridian line and from this point the line was prolonged to the northward. The observer is supposed to be at the north side of the monument and looking south towards Fairfax Stone (Michler Monument.)"

Plate V.

Here follows photohgraph marked: "Triangulation Station on Foley Mountain, showing instruments."

Plate VI.

Here follows photograph marked: "United States Coast and Geodetic Survey Magnetometer No. 18. Instruments used in determining magnetic elements during Western Boundary Survey."

Plate VII.

Here follows photograph, marked: "8" direction Theodolite.

Plate VIII.

Here follows map marked: "Lines of Equal Magnetic Declination for Garrett Co. Oct. 1, 1897. By L. A. Bauer."

These plates are filed among the proceedings in this case.

APPENDIX D.

DISCUSSION BY MR. BANCROFT AND MR. JUSTICE STORY OF THE CHARTER GRANTED TO LORD BALTIMORE.

EXTRACT FROM BANCROFT'S DISCUSSION OF THE MARYLAND CHARTER. (History of the United States, Vol. 1, Ch. 7.)

"It was the peculiar fortune of the United States that they were severally colonized by men, in origin, religious faith, and purposes, as various as the climes which are included within their limits. Before Virginia could complete its settlements, and confirm its claim to jurisdiction over the country north of the Potomac, a new government was erected, on a foundation as extraordinary as its results were benevolent. Sir George Calvert had early become interested in colonial establishments in America. A native of Yorkshire, educated at Oxford, with a mind enlarged by extensive travel, on his entrance into life befriended by Sir Robert Cecil, advanced to the honors of knighthood, and at length employed as one of the two secretaries of state, he not only secured the consideration of his patron and his sovereign, but the good opinion of the world. He was chosen by a disputed majority to represent in parliament his native county. His sincerity, his capacity for business, his industry, and his fidelity, are acknowledged by all historians. In an age when religious controversy still continued to be active, and when the increasing divisions among Protestants were spreading a general alarm, his mind sought relief from controversy in the bosom of the Roman Catholic Church; and, preferring the avowal of his opinions to the emoluments of office, he resigned his place, and openly professed his conversion. King James was never bitter against the Catholics, who respected his pretensions as a mon-

arch; Calvert retained his place in the privy council, and was advanced to the dignity of an Irish peerage. He had, from early life, shared in the general enthusiasm of England in favor of American plantations; he had been a member of the great company of Virginia; and, while secretary of state, he had obtained a special patent for the southern promontory of Newfoundland. How zealous he was in selecting suitable emigrants; how earnest to promote habits of domestic order and economical industry; how lavishly he expended his estate in advancing the interests of his settlement on the rugged shores of Avalon,—is related by those who have written of his life. He desired, as a founder of a colony, not present profit, but a reasonable expectation; and perceiving the evils of a common stock, he cherished enterprise by leaving each one to enjoy the result of his own industry. But numerous difficulties prevented success in Newfoundland; parliament had ever asserted the freedom of the fisheries, which his grants tended to impair; the soil and the climate proved less favorable than had been described in the glowing and deceptive pictures of his early agents; and the incessant danger of attacks from the French, who were possessed of the circumjacent continent, spread a gloom over the future. Twice, it is said, did Lord Baltimore, in person, visit his settlement; with ships, manned at his own charge, he repelled the French, who were hovering around the coast with the design of annoying the English fishermen; and having taken sixty of them prisoners, he secured a temporary tranquillity to his countrymen and his colonists. But, notwithstanding this success, he found all hopes of a thriving plantation in Avalon to be vain. Why should the English emigrate to a rugged and inhospitable island, surrounded by a hostile power, when the hardships of colonizing the milder regions of Virginia had already been encountered, and a peaceful home might be obtained without peril?

Lord Baltimore looked to Virginia, of which the climate, the fertility, and the advantages, were so much extolled. Yet, as a Papist, he could hardly expect a hospitable welcome in a colony from which the careful exclusion of Roman Catholics had been originally avowed as a special object, and where the statutes of the provincial legislature, as well as the commands of the sovereign, aimed at a perpetual religious uniformity. When in October, 1629, he visited Virginia in person, the zeal of the assembly immediately ordered the oaths of allegiance and supremacy to be tendered him. It was in vain that he proposed a form which he was willing to subscribe; the government firmly insisted upon that which had been chosen by the English statutes, and which was purposely framed in such language as no Catholic could adopt. A letter was transmitted from the assembly to the privy council, explanatory of the dispute which had grown out of the intolerance of European legislation. It was evident that Lord Baltimore could never hope for quiet in any attempt at establishing a colony within the jurisdiction of Virginia.

But the country beyond the Potomac seemed to be as yet untenanted by any but the scattered hordes of the native tribes. The French, the Dutch, the Swedes, were preparing to occupy the country; and a grant seemed the readiest mode of securing the soil by an English settlement. The canceling of the Virginia patents had restored to the monarch the ample authority of his prerogative over the soil; he might now sever a province from the colony, to which he had at first assigned a territory so vast; and it was not difficult for Calvert—a man of such moderation, that all parties were taken with him; sincere in his character, disengaged from all interests, and a favorite with the royal family—to obtain a charter for domains in that happy clime. The conditions of the grant conformed to the wishes of the first Lord Baltimore himself, although it was finally issued for the benefit of his son.

The fundamental charter of the colony of Maryland, however, it may have neglected to provide for the power of the king, was the sufficient frank pledge of the liberties of the colonist, not less than of the rights and interests of the proprietary. The ocean, the fortieth parallel of latitude, the meridian of the western fountain of the Potomac, the river itself from its source to its mouth, and a line drawn due east from Watkin's Point to the Atlantic,—these were the limits of the territory, which was now erected into a province, and from Henrietta Maria, the daughter of Henry IV. and wife of Charles I, whose restless mind, disdaining contentment in domestic happiness, aspired to every kind of power and distinction, received the name of Maryland. The country thus described was given to Lord Baltimore, his heirs and assigns, as to its absolute lord and proprietary, to be holden by the tenure of fealty only, paying a yearly rent of two Indian arrows, and a fifth of all gold and silver ore which might be found. Yet the absolute authority was conceded rather with reference to the Crown, than the colonists; for the charter, like his patent, which, in April, 1623, had passed the great seal for Avalon, secured to the emigrants themselves an independent share in the legislation of the province, of which the statutes were to be established with the advice and approbation of the majority of the freemen or their deputies. Representative government was indissolubly connected with the fundamental charter; and it was especially provided, that the authority of the absolute proprietary should not extend to the life, freehold, or estate of any emigrant. These were the features which endeared the proprietary government to the people of Maryland; and, but for these, the patent would have been as worthless as those of the London company, of Warwick, of Gorges, or of Mason. It is a singular fact, that the only proprietary charters, productive of considerable emolument to their owners, were those which conceded popular liberty. For the benefit of the colony, the statutes restraining

emigration were dispensed with; and, at the appointment of the Baron of Baltimore, all present and future liege people of the English king, except such as should be expressly forbidden, might freely transport themselves and their families to Maryland. Christianity, as professed by the Church of England, was protected; but beyond this, silence left room for equality of religious rights, not less than in civil freedom, to be assumed. A monopoly of the fisheries had formerly been earnestly resisted by the commons of England; to avoid all dispute on this point, Calvert, in his charter, expressly renounced any similar claim. As a Catholic, he needed to be free from the jurisdiction of his neighbor; Maryland was carefully separated from Virginia, nor was he obliged to obtain the royal assent to the appointments or the legislation of his province, nor even to make a communication of the results. So far was the English monarch from reserving any right of superintendence in the colony, he left himself without the power to take cognizance of what transpired; and, by an express stipulation, covenanted, that neither he, nor his heirs, nor his successors, should ever, at any tme thereafter, set any imposition, custom, or tax, whatsoever upon the inhabtants of the province. Thus was conferred on Maryland an exemption from English taxation forever. Sir George Calvert was a man of sagacity, and an observing statesman. He had beheld the arbitrary administration of the colonies; and, against any danger of future oppression, he provided the strongest defence which the promise of a monarch could afford. Some other rights were conferred on the proprietary—the advowson of churches; the power of creating manors and courts baron, and of establishing a colonial aristocracy on the system of sub-infeudation. But these things were practically of little moment. Even in Europe, feudal institutions appeared like the decrepitude of age amidst the vigor and enterprise of a new and more peaceful civilization; they could not be perpetuated in the land of their origin; far less could

they renew their youth in America. Sooner might the oldest oaks in Windsor forest be transplanted across the Atlantic, than the social forms, which Europe itself was beginning to reject as antiquated and rotten. But the seeds of popular liberty, contained in the charter, would find in the New World, the very soil best suited to quicken them into life and fruitfulness.

Calvert deserves to be ranked among the most wise and benevolent lawgivers of all ages. He was the first in the history of the Christian world to seek for religious security and peace by the practice of justice, and not by the exercise of power; to plan the establishment of popular institutions with the enjoyment of liberty of conscience; to advance the career of civilization by recognizing the rightful equality of all Christian sects. The asylum of Papists was the spot where, in a remote corner of the world, on the banks of rivers which, as yet, had hardly been explored, the mild forbearance of a proprietary adopted religious freedom as the basis of the State.

Before the patent could be finally adjusted, and pass the great seal, Sir George Calvert died, leaving a name against which the breath of calumny has hardly whispered a reproach. The petulance of his adversaries could only taunt him with being "an Hispaniolized Papist." His son, Cecil Calvert, succeeded to his honors and fortunes. For him, the heir of his father's intentions, not less than of his father's fortunes, the Charter of Maryland was published and confirmed; and he obtained the high distinction of successfully performing what the colonial companies had hardly been able to achieve. At a vast expense, he planted a colony, which for several generations descended as a patrimony to his heirs

Virginia regarded the severing of her territory with apprehension, and before any colonists had embarked under the Charter of Baltimore, her commissioners had in England remonstrated against the grant as an invasion of her com-

merical rights, an infringement on her domains, and a discouragement to her planters. In Strafford, Lord Baltimore found a friend,—for Strafford had been the friend of the father,—and the remonstrance was in vain; the privy council sustained the proprietary Charter, and, advising the parties to an amicable adjustment of all disputes, commanded a free commenrce and a good correspondence between the respective colonies.

Nor was it long before gentlemen of birth and quality resolved to adventure their lives and a good part of their fortunes in the enterprise of planting a colony under so favorable a Charter. Lord Baltimore, who, for some unknown reason, abandoned his purpose of conducting the emigrants in person, appointed his brother to act as his lieutenant; and, on Friday, the twenty-second of November, with a small but favoring gale, Leonard Calvert, and about two hundred people, most of them Roman Catholic gentlemen and their serants, in the Ark and the Dove, a ship of large burden, and a pinnace, set sail for the northern bank of the Potomac. Having staid by the way in Barbadoes and St. Christopher, it was not till February of the following year that they arrived at Point Comfort, in Virginia; where, in obedience to the express letters of King Charles, they were welcomed by Harvey with courtesy and humanity. Clayborne also appeared, but it was as a prophet of ill omen, to terrify the company by predicting the fixed hostility of the natives.

Leaving Point Comfort, Calvert sailed into the Potomac; and with the pinnace ascended the stream. A cross was planted on an island, and the country claimed for Christ and for England. At about forty-seven leagues above the mouth of the river, he found the village of Piscataqua, an Indian settlement nearly opposite Mount Vernon. The chieftain of the tribe would neither bid him go nor stay; "he might use his own discretion." It did not seem safe for the English to plant the first settlement so high up the river; Calvert de-

scended the stream, examining, in his barge, the creeks, estuaries nearer the Chesapeake; he entered the river which is now called St. Mary's, and which he named St. George's; and about four leagues from its junction with the Potomac, he anchored at the Indian town of Yoacomoco. The native inhabitants, having suffered from the superior power of the Susquehannahs, who occupied the district between the bays, had already resolved to remove into places of more security in the interior; and many of them had begun to migrate before the English arrived. To Calvert the spot seemed convenient for a plantation; it was easy, by presents of cloth and axes, of hoes and knives, to gain the good will of the natives, and to purchase their rights to the soil which they were preparing to abandon. They readily gave consent that the English should immediately occupy one half of their town, and, after the harvest, should become the exclusive tenants of the whole. Mutual promises of friendship and peace were made: so that, upon the twenty-seventh day of March, the Catholics took quiet possession of the little place; and religious liberty obtained a home, its only home in the wide world, at the humble village which bore the name of St. Mary's.

Three days after the landing of Calvert, the Ark and the Dove anchored in the harbor. Sir John Harvey soon arrived on a visit; the native chiefs, also, came to welcome or to watch the emigrants, and were so well received, that they resolved to give perpetuity to their league of amity with the English. The Indian women taught the wives of the new comers to make bread of maize; the warriors of the tribe instructed the huntsmen how rich were the forests of America in game, and joined them in the chase. And, as the season of the year invited to the pursuits of agriculture, and the English had come into possession of ground already subdued, they were able, at once, to possess cornfields and gardens, and prepare the wealth of successful husbandry. Virginia, from its surplus produce, could furnish a temporary supply of

food, and all kinds of domestic cattle. No sufferings were endured; no fears of want were excited; the foundation of the colony of Maryland was peacefully and happily laid. Within six months, it had advanced more than Virginia had done in as many years. The proprietary continued with great liberality to provide every thing that was necessary for its comforts and protection, and spared no costs to promote its interests; expending, with the aid of his friends, upwards of forty thousand pounds sterling. But far more memorable was the character of the Maryland institutions. Every other country in the world had persecuting laws; through the benign administration of the government of that province, no person professing to believe in Jesus Christ was permitted to be molested on account of religion. Under the munificence and superintending mildness of Baltimore, the dreary wilderness was soon quickened with the swarming life and activity of prosperous settlements; the Roman Catholics, who were oppressed by the laws of England, were sure to find a peaceful asylum in the quiet harbors of the Chesapeake; and there, too Protestants were sheltered against Protestant intolerance.

Such were the beautiful auspices under which Maryland started into being; its prosperity and peace seemed assured; the interests of its people and its proprietary were united; and for some years its internal peace and harmony were undisturbed by domestic faction. Its history is the history of benevolence, gratitude and toleration."

For McMahon's diffuse commentaries on this Charter, which he characterized as embodying the most extensive and favorable grants which ever emanated from the British crown, see his History of Maryland, pages 133 to 183.

And see also Chalmers', pages 202-205.

Mr. Justice Story's Discussion of the Provincial Charter and Government of Maryland.

"The province of Maryland was included originally in the patent of the Southern or Virginia company; and upon the dissolution of that company it reverted to the crown. King Charles the First, on the 20th June, 1632, granted it by patent to Cecilius Calvert, Lord Baltimore, the son of George Calvert Lord Baltimore, to whom the patent was intended to have been made, but he died before it was executed. By the charter, the king erected it into a province, and gave it the name of Maryland, in honour of his Queen, Henrietta Maria, the daughter of Henry the Fourth of France, to be held of the crown of England, he yearly, for ever, rendering two Indian arrows. The territory was bounded by a right line drawn from Watkins's Point, on Chesapeake bay, to the ocean on the east, thence to that part of the estuary of Delaware on the north, which lieth under the 40th degree, where New England is terminated; thence in a right line by the degree aforesaid to the meridian of the fountain of the Potomac; thence following its course by the further bank to its confluence with the Chesapeake, and thence to Watkin's Point.

The territory thus severed from Virginia was made immediately subject to the crown, and was granted in full and absolute propriety to Lord Baltimore and his heirs, saving the allegiance and sovereign dominion to the crown, with all the rights, regalities, and prerogatives, which the Bishop of Durham enjoyed in that palatinate, to be held of the crown as of Windsor Castle, in the county of Berks, in free and common soccage, and not in capite or by knights' service. The charter further provided, that the proprietary should have authority by and with the consent of the freemen, or their delegates assembled for the purpose, to make all laws for the province, "so that such laws be consonant to reason, and not

repugnant or contrary, but, as far as conveniently might be, agreeable to the laws, statutes, customs, and rights of this our realm of England."

The proprietary was also vested with full executive power; and the establishment of courts of justice was provided for. The proprietary was also authorized to levy subsidies with the assent of the people in assembly. The inhabitants and their children were to enjoy all the rights, immunities and privileges of subject born in England. The right of the advowsons of the churches, according to the establishment of England, and the right to create manors and courts baron, to confer titles of dignity, to erect ports and other regalities, were expressly given to the proprietary. An exemption of the colonists from all talliages on their goods and estates to be imposed by the crown was expressly covenanted for in perpetuity; an exemption, which had been conferred on other colonies for years only. License was granted to all subjects to transport themselves to the province; and its products were to be imported into England and Ireland under such taxes only, as were paid by other subjects. And the usual powers in other charters to repel invasions, to suppress rebellions, etc., were also conferred on the proprietary.

Such is the substance of the patent. And Chalmers has with some pride asserted, that "Maryland has always enjoyed the unrivalled honour of being the first colony, which was erected into a province of the English empire, and governed regularly by laws enacted in a provincial legislature." It is also observable, that there is no clause in the patent, which required any transmission of the province laws to the king, or providing for his approbation or assent. Under this charter, Maryland continued to be governed, with some short intervals of interruption, down to the period of the American Revolution, by the successors of the original property.

The first emigration made under the auspices of Lord Baltimore was in November, 1632, and consisted of about 200

gentlemen of considerable fortune and rank, and their adherents, being chiefly Roman Catholics. "He laid the foundation of this province, (says Chalmers) upon the broad basis of security to property, and of freedom of religion, granting in absolute fee fifty acres of land to every emigrant; establishing Christianity agreeably to the old common law, of which it is a part, without allowing pre-eminence to any particular sect. The wisdom of his choice soon converted a dreary wilderness into a prosperous colony." It is certainly very honourable to the liberality and public spirit of the proprietary, that he should have introduced into his fundamental policy the doctrine of general toleration and equality among Christian sects, (for he does not appear to have gone farther;) and have thus given the earliest example of a legislator inviting his subjects to the free indulgence of religious opinion. This was anterior to the settlement of Rhode Island, and therefore merits the enviable rank of being the first recognition among the colonists of the glorious and indefeasible rights of conscience. Rhode Island seems without any apparent consciousness of co-operation to have gone farther, and to have protected an universal freedom of religious opinion in Jew and Gentile, in Christian and Pagan, without any distinction, to be found in its legislation.

The first legislative assembly of Maryland, held by the freemen at large, was in 1634-35; but little of their proceedings is known. No acts appear to have been adopted until 1638-1639, when provision was made in consequence of an increase of the colonists for a representative assembly, called the House of Assembly, chosen by the freemen; and the laws passed by the assembly, and approved by the proprietary or his lieutenant, were to be full of force. The assembly was afterwards divided into an upper and lower house. At the same session, an act, which may be considered as in some sort a Magna Charta, was passed, declaring among other things, that "Holy Church within this province shall have

all her rights and prerogatives;" "that the inhabitants shall have all their rights and liberties according to the great charter of England;" and that the goods of debtors, if not sufficient to pay their debts, shall be sold and distributed pro rata, saving debts to the proprietary. In 1649 an act was passed punishing blasphemy, or denying the Holy Trinity, with death and confiscation of goods and lands; and, strangely enough after such a provision, in the same act, after a preamble, reciting that the confining of conscience in matters of religion hath frequently fallen out to be of dangerous consequence, it is enacted, that no person "professing to believe in Jesus Christ," shall be molested for or in respect to his religion, or the free exercise thereof, nor any way compelled to the belief or exercise of any other religion. It seems not to have been even imagined, that a belief in the divine mission of Jesus Christ, in the eyes of any sect of Christians, be quite consistent with the denial of the Trinity. This act was confirmed among the perpetual laws in 1676.

The legislation of Maryland does not, indeed, appear to have afforded an uniform protection in respect to religion, such as the original policy of the founder would seem to indicate. Under the protectorate of Cromwell, Roman Catholics were expressly denied any protection in the province; and all others, "who profess faith in God by Jesus Christ, though differing in judgment from the doctrine, worship, or discipline publicly held forth," were not to be restrained from the exercise of their religion. In 1696 the Church of England was established in the province; and in 1702, the liturgy and rites, and ceremonies of the Church of England were required to be pursued in all the churches, with such toleration for Dissenters, however, as was provided for in the act of 1 William and Mary. And the introduction of the test and abjurgation acts, in 1716, excluded all Roman Catholics from office.

It appears to have been a policy adopted at no great distance of time after the settlement of the colony to provide for the public registration of conveyances of real estate. In the silence of the statute book until 1715, it is to be presumed, that the system of descents of intestate estates was that of the parent country. In that year an act was passed, which made the estate partible among all the children; and the system thus introduced has, in its sustance, never been departed from. Maryland, too, like the other colonies, was early alive to the importance of possessing the sole power of internal taxation; and accordingly, in 1650, it was declared, that no taxes should be levied without the consent of the general assembly.

Upon the revolution of 1688, the government of Maryland was seized into the hands of the crown, and was not again restored to the proprietary until 1716. From that period no interruption occurred until the American Revolution."

APPENDIX E.

ADDENDA.

In Professor Alexander Johnston's historical and economic article on "Maryland" in Lalor's Cyclopaedia of Political Science, volume II, page 813, that eminent American scholar interprets her Charter as defining her boundaries in the same manner as the other authorities cited in the text of the aforegoing brief. He says:

> "BOUNDARIES: The charter gave the colony as a northern boundary the 40th degree parallel of latitude; as an eastern boundary Delaware bay and the ocean; as a southern boundary, a due line east from Watkin's Point to the ocean; and as a *western boundary the 'Pattowmack river' to its 'first fountain,' and thence* due north by a true meridian. The grant, therefore, evidently embraced the whole strip of the modern State of Delaware and a wide strip of southern Pennsylvania, including the city of Philadelphia. Penn claimed the parallel of 39° as 'the beginning of the parallel of 40°,' which was to be his southern boundary, and disputed Baltimore's claim to Delaware, since the Maryland patent was 'for uncultivated lands,' and Delaware was already settled by the Swedes. Penn's influence with Charles II obtained a verdict in his favor from the Board of Trade in 1685, but the Baltimore family did not finally submit until 1766. In that year the two proprietors sent Charles Mason and Jeremiah

Dixon, two English surveyors, who marked off 'Mason and Dixon's Line,' as decided by the Board of Trade, placing at the end of each mile a stone with the letter P and the Penn arms on the north side and the letter M and the Baltimore arms on the south side.

"The southern boundary was settled with Virginia in 1668; but in 1858, the Commissioners appointed to restore it found that it had not been drawn due east, varying slighty to the north. Maryland, however, did not attempt to change the ancient line. *On the west, Maryland always claimed the south branch as the true origin of the Potomac; but Virginia has successfully maintained the north branch as the boundary, though the question has never been settled.*"

In the Apollon, 9 Wheaton, 369, Mr. Justice Story said:

"St. Mary's River formed, at this period, the boundary between the United States and the Spanish territory, the boundary line by the treaty of 1795, running through the middle thereof *in its whole course to the Atlantic Ocean.*"

See also the opinion of the Attorney-General of the United States in the matter of the boundaries of *Rio Bravo*, 8 Attorney-General Opinions, 175; Cushing; 1856.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 1, Originals.

Assigned for Argument October 25, 1909.

THE STATE OF MARYLAND,

vs.

THE STATE OF WEST VIRGINIA.

Addenda to BRIEF FOR THE STATE OF MARYLAND.

I.

ADDITIONAL AUTHORITIES TO THE EFFECT THAT THE TRUE CONSTRUCTION OF THE GRANT IN THE MARYLAND CHARTER CALLS FOR THE FIRST FOUNTAIN OF THE POTOMAC AS A POINT IN THE BOUNDARY OF MARYLAND AND AS A COMMON TERMINUS OF ITS WESTERN AND SOUTHWESTERN BOUNDARIES.

Award rendered in 1877 by Hon. Jeremiah S. Black, Hon. Charles J. Jenkins and James B. Beck, Arbitrators of the Boundary Dispute between Virginia and Maryland. On

the point above mentioned, which arose incidentally for their consideration, all three of these distinguished Arbitrators concurred in their construction of the Maryland Grant. The part of their opinion which bears on this subject, written, it is believed, by Jduge Black, is as follows:

> "That part of the Charter which defines the boundaries of the Province speaks, not equivocally, but in terms so clear and apt that the intent is readily perceived. * * *
>
> "The boundaries of Maryland are described in the Charter as beginning at Watkins Point and running due east to the sea, up the shore of the ocean and the Delaware bay to the fortieth degree of latitude; thence westward, along that degree to the longitude of the headwater of the Potomac; thence *southward* to that river and *by it* or one of its banks to Cinquack on the Chesapeake, and from Cinquack straight across the Bay to the place of beginning. * * *
>
> "When a river is called for as a boundary between two adjacent territories (whether private property or public domains) the line runs along the middle thread of the water. A concession of lands *to* a stream does not stop at one bank or cross over to the other, but finds its limit midway between them. But a river may be included or excluded if the parties choose to have it so. If the intent is expressed that the line shall be upon one bank or another the mere force of construction cannot put it anywhere else; the natural interpretation is the legal and proper one.
>
> "This is too obviously just to need the support of authority; but it was well illustrated by the Supreme Court of the United States in the case of Ingersoll v. Howard (13 How. 381). Alabama claimed to the middle of the Chattahoochee river by virtue of a boundary described in a concession from Georgia, thus: 'Beginning on the *western bank of the* Chattahoochee river, where

the same crosses the boundary line between the United States and Spain; running thence *up* the river and *along the western bank thereof*, etc.' The Court held that these words established the line of boundary upon the western bank. There is some resemblance between that case and the one under consideration.

"The Northern boundary of Maryland is by the Charter to run westward to the true meridian of the first fountain of the Potomac. *That point being ascertained, it shall turn at right angles and run towards* (*literally against*) *the south—'vergendo versus meridiem'—where? 'ad ulterioram predicti fluminis ripam'—to the further bank of the aforesaid river.* Approaching the river from the north the *further* bank is *the south bank*, of course. The description proceeds without a pause, thus: *'et eam sequendo qua plaga occidentalis ad meridionalem spectat usque ad locum quendam appellatum Cinquack.'* Now the words *'eam sequendo'* are a direction that something shall be followed in running the line between the point already fixed on the south bank of the Potomac, *where it rises in the mountain*, and Cinquack, which is on the same side of the river, near to its mouth. What shall we follow? Clearly *eam ripam* and clearly not *id flumen*, if we take the grammatical sense of the phrase. Another consideration impresses us a good deal. Lawyers in the reign of Charles I wrote Latin in the idiom of the vernacular tongue. We would naturally expect to see the thought of these parties expressed by words arranged in the English order, thus: *ad ulteriorem ripam predicti fluminis et sequendo eam.*

"The other and more classical collocation was not adopted for its euphony, but for the sake of precision. It brought *ripam* and *eam* into close juxtaposition, and made the antecession so immediate that it could not be mistaken. The interjected phrase *'qua plaga occidentalis*

ad meridionalem spectat' has had its share of the minute verbal criticism bestowed upon the whole document; but we see nothing in it except an attempt (perhaps not very successful) to describe the aspect of the western shore where it turns to the south. Certainly there is nothing there which requires the line to leave the river bank. Apart from all this, *it looks utterly improbable that the two termini of this should not have been fixed on the south side of the river without a purpose to put the line itself on the same side. The intent of the Charter is manifest all through to include the whole river within Lord Baltimore's grant.* It seems to us a clearer case than that decided in *Ingersoll v. Howard.*

"For these reasons we conclude that the Charter line was on the right bank of the Potomac, where the high-water mark is impressed upon it, and that line follows the bank *along the whole course of the river, from its first fountain to its mouth,* and *'usque ad locum quendam appellatum Cinquack.'* "

Hildreth's History of the United States, Volume I, pages 206-207:

"The Potomac with a line due east from its mouth across Chesapeake Bay and the peninsula called the eastern shore formed the southern boundary of this new province; on the east it had the ocean and Delaware Bay; on the north the fortieth degree of latitude, the southern boundary of the great New England patent; and *on the west a line due north from the westernmost head of the Potomac.*"

Justin Windsor's "Narrative and Critical History of America," Vol. III, Chap. XIII, page 520:

"The territory granted was defined with accuracy. *The southern boundary was the further bank of the Potomac*

from its source to its mouth in the Bay of Chesapeake and ran thence to the promontory called Watkins Point, and thence east to the ocean * * * The northern boundary was a straight line, on the fortieth degree of latitude to the meridian of the *first fountain of the Potomac where the southern boundary began.*"

II.

THE DEFENDANT, WEST VIRGINIA, HAS REPEATEDLY ADMITTED IN HER ANSWER, CROSS-BILL AND BRIEF IN THIS CASE THAT, WHEREVER THE FIRST FOUNTAIN OF THE POTOMAC RIVER MAY BE, IT IS A POINT IN THE BOUNDARY OF MARYLAND AND NOT OUTSIDE OF THAT BOUNDARY.

With respect to the proposition that, no matter where the First Fountain of the Potomac Rivre may be ascertained to be, *it is a point within the boundary of Maryland and a common terminus of its western and southwestern boundaries,* it is submitted to this Court that the Record is replete with repeated admissions upon the part of the Defendant, the State of West Virginia, of this fact. And these admissions, which are set out below, with references to the Record, are now presented to the Court in further contravention of the Defendant's claim that the Fairfax Stone, located four-fifths of a mile south of the main stream of the Potomac River and south of what West Virginia alleges to be the southwestern boundary of Maryland, and also located almost two miles to the east of the most western fountain of the North Branch of the Potomac River, is the point of location of the meridian of the First Fountain of the Potomac River called for by the Charter.

In the Answer of West Virginia to the Bill of Complaint of Maryland, Record, pages 20-21, the Fairfax Grant of the

Northern Neck is referred to and described as "bounded by and within the *heads* of Tappahannock, alias Rappahannock, and Querrough or Potomac Rivers, *the courses of these rivers* and Chesapeake Bay," etc.

It thus appears that the boundary line between the Fairfax Grant and the State of Maryland was along *the whole course of the River from its source to its mouth.*

And this is further shown on page 21 of the Record, where the defendant declares the effect of the grant in the Fairfax patent to be

> "all that certain tract, etc., of land, situate, etc., in America and bounded by and within the *heads* of the river of Tappahannock alias Rappahannock, and Queriough alias Potowmack River, *courses of said river* together with *all* the rivers themselves," etc.

Record, page 33: In the description of Grant County, its boundaries are set out by the Defendant as follows: "Beginning at the Fairfax Stone at the junction of the line between West Virginia and Maryland, corner to said county of Hardy, and with the said boundary line down the North Branch of the Potomac to the Hampshire and Hardy county line," etc. And the Answer, commenting on the above description, states: "The Fairfax Stone is, therefore, its northwestern corner."

On page 34 of the Record, the Defendant, in its Answer, thus describes Preston County:

> "The line running from Fairfax Stone to the Pennsylvania line is its eastern border line and the Fairfax Stone is the southeastern corner of said county."

These descriptions, as we understand them, clearly show that, according to the Defendant, the Fairfax Stone, which the Defendant holds to be located at the First Fountain of the Potomac, is a point in the boundary line between Maryland and West Virginia.

And on page 36 of the Record, it is stated in express terms and with absolute certainty by the Defendant that:

> "The Fairfax Stone has been a point in the boundaries of the counties of Virginia ever since the formation of Frederick and Hampshire counties in 1753, and is *now a point in the boundaries* of the counties of Grant, Tucker and Preston in West Virginia, *and also of Garrett County in Maryland,* as will be more fully shown hereafter."

On page 37 of the Record, the Defendant, in its Answer, referring to Captain John Smith's Map published in 1629, says:

> "The general direction of the Potomac River, as given on this map, is a northwesterly direction."

And on page 38 of the Record, referring to the map of Augustine Herman, made in 1670, the defendant says that it "also represents the Potomac as flowing from the northwest and as rising very near the 40°."

On page 41 of the Record, the Defendant, contending that the North Branch of the Potomac River, as distinguished from the South Branch, is the main stream, refers to matters of topography and to the place of the origin of the river where it rises out of the mountain, as sustaining this claim upon her part, which matters of topography, the State of Maryland submits, go directly to support and confirm Maryland's claim that the north fork of the North Branch is the main stream of the River, and that the Charter contemplates the River as a boundary from its most northwesterly source. This statement in the Answer of the Defendant is as follows:

> "The general course of the Potomac River and valley from the mouth of the Shenandoah to where it strikes the main Alleganey mountains at Piedmont is northwesterly. The country through which it extends con-

sists of alternate mountains, or ranges of hills and valleys running in a northeast and southwestward direction, parallel with the main Allegany range, and the Potomac river and valley cut across these mountains, hills and valleys almost at right angles. These intersected valleys are drained by streams that follow their course and empty into the main river. The South Branch is one of these streams and though it is larger and longer than any of the others, in other respects it is exactly like them.

"*The Potomac river rises out of the main Alleganey mountains and persistently cuts its way across the small intervening mountains and hills, which have the same general direction as the great Appalachian chain, in a southeastern direction towards the sea;* the South Branch is but one of the many streams that flows into it; it is but an arm of the main body, and though it is a large arm and is longer than the main trunk from the point of junction with that trunk to the head, yet that fact does not make it the main body, and the head of the body will not be sought for at the extremity of the arm simply because of the length of the arm."

Again in that part of her Answer which begins at the bottom of page 49 and continues on page 50 of the Record, the Defendant repeats her admission in effect that the First Fountain of the Potomac is to be regarded as a point in the boundaries of Maryland and not as a point outside of the boundaries, or two miles east of the western source of the River, as follows:

"At the time this Constitution was adopted, Virginia held up *to* the North Branch of the Potomac and *to* the Fairfax Stone, and *these were also the boundaries of Maryland.*"

On page 51 of the Record it again appears that the defendant, in its Answer, referring to the Compact of 1785, between

Maryland and Virginia, declares that although some of the provisions of the compact "had special reference to that part of the Potomac which is navigable and which lies below the limits of the State of West Virginia," adds "*but some of them apply to that River throughout its whole length* and at the time said Compact was made the State of Virginia claimed to the North Branch of the Potomac and it was well understood that said compact related to said Branch and not to the South Branch so far as it was applicable to the River above the junction of said branches."

And on the same page of the Record and of the Answer only a few lines further down, the Defendant State declares that the North Branch was "recognized and accepted," by the compact of 1785, "*as the boundary line between the two States,* and it was so understood at that time and *has been so understood ever since* by the people living along said North Branch and by all the people of said States."

In the next place, West Virginia's Answer, at page 52 of the Record, after referring to the claim set forth in the Maryland Act of 1818, that "the *most western source* of the North Branch of the Potomac" should be taken "*as the point from which the western boundary should start*" goes on to recite the Virginia Act of 1822, passed in response to the Maryland Act of 1818, as proposing that, in settling the western limits of Maryland and the dividing line between West Virginia and that State, the dividing line should "*commence at the Fairfax Stone on the headwaters of the North Branch of the Potomac River* and run a due course to intersect the line between this State and the State of Pennsylvania."

And on pages 53-54 of the Record, the Defendant in its Answer refers to and sets forth the Act of Virginia of 1833, as follows:

> "In 1833 the Legislature of Virginia passed an Act (Acts of 1833, page 24) similar to the above recited

> Act of 1822, except that it provided for the *boundary* line 'to commence at the Fairfax Stone or at the First Fountain of the Cohongoruton or North Branch of the Potomac River, and to run a due north course,' etc."

Beginning on pages 55-56 of the Record, by reference to the provisions of the Maryland Act of 1852 and the Virginia Act of 1854, the Defendant, in its Answer, shows that the boundary line between the two States was contemplated in the proposed arrangement then pending, as beginning at the Fairfax Stone.

And another important and significant admission by West Virginia in this connection is found in her Answer, at page 70 of the Record, under the caption *"North Bank of the Potomac the Boundary,"* as follows:

> "The State of West Virginia further answering says that the *true northern boundary line between her and the State of Maryland* is the *left* or *northern* shore of the Potomac river at low-water mark, *for the whole extent of that shore conterminous between Maryland and West Virginia;* that is to say, beginning on the division line between the States of Virginia and West Virginia at or near Harper's Ferry, at low-water mark, on the left *or northern shore* of the Potomac river, and following *said shore to the Fairfax Stone* at the head spring of said river; and she prays that the Court will establish said line as her northern boundary with the State of Maryland, that her full jurisdiction and authority of the whole of said river to low-water mark on the said northern shore may be fully confirmed and quieted by a decree of this honorable Court in this case."

The attention of the Court is now particularly asked to another highly significant statement in the Answer of the Defendant and in the Record in this case, as bearing both upon

the point here under consideration, namely, that the First Fountain of the Potomac River *is a point in the boundary of Maryland and a common terminus between her western and southwestern boundaries,* and also upon the broader proposition set forth in the main Brief of the Plaintiff heretofore filed herein, that the spring at the Fairfax Stone cannot be regarded as the First Fountain of the Pootmac River, because to take it as the First Fountain would defeat the clear call of the Charter for the western and southwestern boundary of the State.

The statement referred to is found on page 74 of the Record, near the end of the Defendant's Answer, and is repeated in effect in the concluding statement of the Answer, on page 76 of the Record.

The statement referred to is made in connection with the contention of the Defendant, that the territory of Virginia under the Fairfax Grant *extends to the north bank* of the Potomac River and that the *bed* of the River is *a part of Virginia soil. It was as a substantive and necessary part of this claim that the claim was made that the Fairfax Spring was the First Fountain of the Potomac River, because, as already pointed out by the Plaintiff in its main Brief, if the Fairfax Spring be taken as the First Fountain, then the southern bank at that spring becomes the northern bank at the point where the meridian, running north from the spring, crosses the main body of the stream. It is, however, now judicially settled that the southern bank of the Potomac River marks the northern boundary of Virginia and West Virginia, and that the bed of the river itself is a part of the Maryland grant. So that it is clear that to take the spring at Fairfax Stone as the head spring of the River, the southern bank of the stream flowing from that spring becomes the northern bank of the River at the point where the meridian from the spring crosses it, which is contrary to and irreconcilable with the Charter of Maryland.*

Now, then, as illustrating the irresistible force of this contention upon the part of Maryland, we refer to the statement, above alluded to, which the Defendant makes in its Answer at page 74 and again at page 76 of the Record, as follows:

> "Lieut. Michler, in his report, on page 28 of the pamphlet filed herewith, marked 'Exhibit J,' says:
>
> " 'Within 4,132 feet north of the Fairfax Stone the line' (speaking of the meridian line run by him from the Fairfax Stone to the Pennsylvania line) 'crosses the North Branch of the Potomac, the stream making a bend to the west and north from the spring, before assuming its general course towards the east. It has a narrow sheet of water there, twenty feet from bank to bank, running through laurel swamps.'
>
> "*The line therefore drawn from the Pennsylvania line south towards the Fairfax Stone to the 'further bank of the said river' would cross the river before it reached said stone, and the 'farther bank' would be that bank which becomes the northern bank after the river assumes its general course towards the east.*"

And in accordance with the above averment, the Defendant at the conclusion of its Answer says again, on page 76:

> "Wherefore the State of West Virginia claims and insists that the *boundary line* between her and the State of Maryland is the line of low water mark on the *north bank* of the Potomac river from the division line between Virginia and West Virginia *to the head spring of the North Branch of the Potomac river at the Fairfax Stone,* and thence running *from said Fairfax Stone,* etc."

And both of these admissions are repeated in the cross-bill filed by West Virginia against Maryland (Record, pages 515 and 517).

And in this same connection, see the Report of the Virginia Commissioners of 1873, which the Defendant has filed as an exhibit with its Answer at pages 144-145 of the Record, as follows:

> "But Lord Fairfax and Lord Baltimore fixed the boundary by the Fairfax Stone, as found by Michler. And Michler's report showed a curious result of survey in demonstrating, perhaps what the words *'ulteriorum, fluminis, ripam,'* in Baltimore's grant, meant. Michler, in making his survey could not of course begin to run a line South from the parrellel of 40° N. L., until he first found the head spring, the meridian of which he was to run. He searched for and found the spring and stone marked by the Fairfax initials, and then run its meridianal line North until he crossed or came to the parallel of 40° N. L. In doing so he found that within four or five thousand yards North of the stone and spring his meridian line *struck the Potomac river, there running Northwest.* Instead of running South from the parallel of 40° to the spring, he was running north from the spring to the parallel—exactly the reverse of the course required by the grant. The grantor, as it were, standing on the parallel of 40°, gave a line inclining South from the meridian of the spring to the ulterior bank of the river from his standpoint on the parallel. The river running there Northwest and then deflecting West and South until it takes its general course Southeast, *the ulterior bank of the river was, geographically, the left bank thereof.* The line thus mathematically was fixed on the North side of the Potomac. Any one can see this by the simplest diagram, thus: (Diagram appears here.)
>
> "The ulterior bank of the river is the *South side where the meridian of the spring cuts it, but it is the North side in the general course of the river."*

And see also, to the same effect, pages 515-517 of the Record, where the same statement is repeated by West Virginia in her Cross-Bill against the State of Maryland; and see also, in this connection, the Record, page 659, being Plaintiff's Exhibit No. 8, the Report of Astronomical and Magnetic Work Done in 1897 by Doctor Bauer:

"PLATE III.

"Here follows photograph, marked: 'The Potomac River at the point where the Fairfax line crosses, ¾ mile north of Fairfax Stone. The man has hand on line stake and is looking north along the line.'

" 'This shows that a good-sized stream flows from the west towards the east. It would be *impossible* to comply with the *acts of the Maryland and Virginia Assemblies passed in* 1852 *&* 1858 that the line is to begin at the *Fairfax Stone and that part of the Maryland Charter terminating the western boundary at the 'further bank' of the Potomac.'* " .

That is to say that by taking the Fairfax Stone as at the First Fountain you *conflict with the Charter!*

And see also Mr. Brown's Report, Record, pages 974-975, beginning at the bottom of page 974:

"The southwestern corner of the State of Maryland, according to the pretensions of the State of West Virginia in this case, does not stand at any spring, nor at the 'Fairfax Stone,' but at a point 1.9 miles from its source, where the banks of the Potomac river are 30 feet apart, and in a direct line 4020 feet north of Fairfax Stone; in other words, the line running north from the 'Fairfax Stone' is not a dividing line at all, but wholly within the territory of West Virginia.

"This arises from the fact, that the river, the general course of which is northeasterly, divides into two branches, at Station 31, above noted. In following up

the southern branch, it is found to curve gradually in a semi-circle to the 'Fairfax Stone,' the last course being in a direction exactly opposite to that of the river at the crossing of the Fairfax Meridian, 4020 feet to the north."

And see also Record, pages 975-6:

"These calls of the Charter are precisely and entirely complied with by the Potomac Spring and stream. The meridian line from the 40th parallel of latitude, verging toward the South to this fountain, leaves to the East all other waters of the Potomac river.

"From this point, running with the stream which flows from this spring toward the southwest, the State line of Maryland follows the same on the West and South bank, and thence on to the mouth of the river.

"The Fairfax spring and run do not, in any way, comply with the Calls contained in the Charter. This spring is not perennial; it is wholly outside of territory claimed and conceded to Maryland, so that it is impossible for the Maryland State Line to run from this point; furthermore, owing to the circular curve of the stream, the South bank soon becomes the North bank, making it impossible to follow the South bank continuously from the source of the river to its mouth; again, the Fairfax Meridian runs North for three-fourths of a mile through the territory of West Virginia, cutting across the river and several of its tributaries, leaving many of the waters and springs to the west, the main stream or river running 1.9 miles further to the west, so that in no sense can the 'Fairfax Stone' be said to be at the 'first fountain of the Potomac.'"

And all these admissions are repeated in the Brief of the Defendant.

Thus, on page 5 of the Brief of the Defendant, it is said that the first question in the case to be determined by this Court is:

> "Whether the *true boundary* of the State of Maryland extends *to the head spring* of the North Branch *as claimed by West Virginia, or to the head spring* of the South Branch of the Potomac, as apparently claimed by Maryland in her bill in this cause, and, *consequently,* whether the North or South Branch *constitutes the true division line between the States* and whether the *line running north to the Pennsylvania line* shall be drawn *from the first fountain* of the North Branch of the Potomac or the first fountain of the South Branch."

And again, on page 7 of West Virginia's Brief, it is said, immediately after quoting the description of the boundaries set forth in the Maryland Charter:

> "This description shows that the Province of Maryland was *bounded by the Potomac River and that the head or first source of that river was one of the points in its boundary.* The two grants therefore to Lord Baltimore and Lord Fairfax did not properly conflict, but were *conterminous, each calling for the head spring or first source of the Potomac River and for the river itself.* * * * The only conflict between the two, therefore, apparently is the *grant of the river.* But, at present, our intention is to call the Court's attention only to the fact that both grants *called for the head spring of the Potomac, as will be fully shown hereafter."*

And for other admissions to the same effect, see—

West Virginia's Brief, pages 38, 57, 58, 59, 60, 62-63, 67-68.

It thus appears from the repeated and clear claims and admissions of the Defendant, West Virginia, that the First Fountain of the Potomac is a point in the boundaries of Maryland as called for by her Charter; that it is a common terminus between her western and southwestern boundaries; that the boundary therefore runs along the *whole course of the river from its source to its mouth;* and that the contention which she now makes that the Fairfax Spring, four-fifths of a mile outside of what she claims is the boundary of Maryland and nearly two miles east of the most western source of the river, and so located that what the Charter requires to be the south bank becomes the north bank of the river, utterly conflicts with and contradicts the distinct and unmistakable claims and admissions which she has, as above shown, heretofore repeatedly made to the Court.

III.

REPEATED ADMISSIONS BY WEST VIRGINIA IN THIS CASE THAT THE DISPUTE OR CONTROVERSY BETWEEN HERSELF AND MARYLAND OVER THE WESTERN AND SOUTHWESTERN BOUNDARY OF MARYLAND HAS ALWAYS BEEN AND STILL IS OPEN, UNSETTLED AND PENDING.

As further showing and establishing beyond doubt the *fact* that the old State of Virginia, the State of West Virginia and the State of Maryland at all times, up to the institution of this suit, acknowledged and treated the western boundary of Maryland, in connection with the meridian of the First Fountain of the North Branch of the Potomac River, as an open, unsettled and pending question, the Plaintiff presents to the Court the following quotations from and references to the Record and the Brief filed by the Defendant.

In the Bill of Complaint of the Plaintiff, at pages 3 and 4 of the Record, the following allegation is made:

"The State of Maryland further represents unto your Honors that from 1785 down to the period of the Civil War in 1861, various efforts were made for the ascertainment of the western boundary line between the States of Maryland and West Virginia, but without success, and in the year 1861, the State of West Virginia was created out of a part of Virginia and was admitted into and became a member of the American Union, and in her boundaries (which are designated by county lines), are included those counties in which the disputed territory lies, and, therefore, the question of the actual boundary was left to be settled between the States of Maryland and West Virginia. It is further represented unto your Honors that from 1868 down to the present time various means have been resorted to by the State of Maryland to have the controversy with the State of West Virginia settled in an amicable and equitable manner, but all efforts in that regard have signally failed and the State of Maryland is compelled to assert her just and legal rights under the terms of the Charter aforesaid."

The Answer of the Defendant does not deny that such efforts as above alleged were repeatedly made by Maryland to settle the continued and open controversy between the two States.

In the Record, at page 6, appears the Act of the Legislature of Maryland of 1890, Chapter 563, directing the institution of this suit. The title of this Act declares its object to be to direct the Attorney-General of the State "to take such steps as may be necessary to obtain a decision of the Supreme Court of the United States, which *will settle* the *controversy* between the State of Maryland and West Virginia concerning the true location of that portion of the boundary line between the two States, etc."

And Section 1 of the Act provides that the Attorney-General of the State shall take such steps as may be necessary to obtain a decision of the Supreme Court of the United States which *will settle the controversy between the States of Maryland and West Virginia over and concerning, and which will finally fix and determine the true location of that portion of the boundary line between the States, etc.*"

The attention of the Court is next called to the following declarations and admissions in the Answer of the State of West Virginia to the Bill of Complaint of Maryland, which appear on pages 51, 52, 53, 54 and 55 of the Record, and which, it is respectfully submitted, are decisive admissions upon the part of the Defendant that the dispute here in question has, from its origin, always been an open one and was pending and unsettled at the time the said Answer of the Defendant was filed herein.

On pages 51 and 52 of the Record it appears that the Defendant states:

> "And although the Legislature of that State (Maryland) in acting upon his (Deakins) report declares that said supposed boundary line is, in their opinion, far within that which that State might rightfully claim as her western boundary, yet, the language does not indicate that this Legislature intended to assert and claim to go to the South Branch, *but rather that the Fairfax Stone was not planted at the true fountain head of the North Branch, and that said fountain head was further west than said stone, and, at a later date, as will appear hereafter, this very claim was made by said State through her Commissioners.*
>
> "In 1795, in 1801 and again in 1810, the General Assembly of Maryland adopted resolutions providing for the appointment of Commissioners to meet such persons as the State of Virginia should appoint *'to adjust and*

settle by compact the southern and western boundaries of the State and fix the dividing line and boundaries, etc.'

"The State of West Virginia says that she is informed that no commissioners were in fact appointed by Virginia in response to the resolutions of Maryland of 1795, 1801 and 1810, and that Virginia was not willing even to enter into a discussion of her right to the territory *between the two branches of the Potomac River,* and that, in fact, nothing was done by Virginia *until after Maryland passed the Act of 1818.*

"In 1818, the General Assembly of Maryland passed an Act (Chapter 206, Acts of 1818) proposing to Virginia the appointment of Commissioners TO SETTLE THE WESTERN BOUNDARY OF SAID STATE AND AGREEING TO ADOPT 'THE MOST WESTERN SOURCE OF THE NORTH BRANCH OF THE POTOMAC' as the point from which the western boundary should start.

"On the 28th of February, 1822, the Legislature of Virginia passed an Act (Chapter 14, Acts of 1822), which provides that 'the Governor, etc., is hereby authorized to appoint three Commissioners on the part of the State to meet such Commissioners as may be appointed for the same purpose *by the Commonwealth of Maryland to settle and adjust, by mutual compact between the two governments, the western limits of this State and the dividing line between this State and the Commonwealth of Maryland;* to commence at the Fairfax Stone on the headwaters of the North Branch of the Potomac River and to run a due north course to intersect the line between this State and the State of Pennsylvania.' Said Commissioners were required to report their proceedings to the General Assembly *for confirmation or rejection.*

"*Under these resolutions Commissioners were appointed both by Maryland and Virginia, and they went to the Fairfax Stone in 1824.* THE MARYLAND COMMISSIONERS REFUSED TO BEGIN AT THE FAIRFAX STONE, BECAUSE THEY CLAIMED IT WAS NOT AT 'THE MOST WESTERN SOURCE OF THE NORTH BRANCH OF THE POTOMAC RIVER.' THEY CLAIMED THAT THE MOST WESTERN SOURCE WAS A POINT ABOUT ONE MILE WEST OF THE FAIRFAX STONE, AND THAT THE DIFFERENCE BETWEEN THE TWO PLACES OF BEGINNING EMBRACED A SECTION OF COUNTRY ABOUT ONE MILE IN WIDTH AND THIRTY-SIX MILES IN LENGTH. The Virginia Act required her Commissioners to begin at the Fairfax Stone. This difference between the two Commissioners put an end to any further negotiations, and consequently nothing was done."

Incidentally, at this point, it is earnestly urged upon the part of Maryland that such declarations and admissions in the Answer of West Virginia, and which are in effect repeated in her Cross-Bill against Maryland, conclusively refute the claim afterwards and now made by her that Maryland has acquiesced in the location of the Fairfax Stone as the first fountain of the Potomac River.

On page 53 of the Record, the Answer of West Virginia, continuing, further states:

"In 1825 the Maryland Legislature passed another resolution providing for the appointment of Commissioners and that the Governor of Delaware should act as umpire in case of disagreement, and in 1832 a Committee of the Legislature of that State made an elaborate report to the Legislature on the question of the boundary line of the State, in which what purports to be a history of the matter is given, and the various Acts and Resolutions of the Legislatures of the two States above men-

tioned are referred to. In speaking of the passage of the Resolution of 1818, above mentioned, by the Legislature of Maryland, the Committee says: 'This State had now become wearied with her efforts to reclaim the territory south of the North Branch, and hence this Act of 1818, Chapter 206, in proposing to Virginia the appointment of Commissioners, agrees to adopt the most western surce of the North Branch as the point from which the western boundary shall start.' And the Report closes with a recommendation of certain resolutions providing for appointment of Commissioners, and that the Governor of Delaware should act as umpire. This Report and the accompanying Resolutions were transmitted to the Governor of Virginia in June, 1832, and are found in the Journal and Documents of the House of Delegates of Virginia of 1832-1833."

The Answer of West Virginia then goes on to set forth the appointment of Charles J. Faulkner, Esquire, by the Governor of Virginia, under an Act of its Legislature of March 20th, 1832, to investigate and report upon the subject of the boundaries between the two States.

And then, beginning at the bottom of page 53 of the Record, and continuing upon pages 54, 55 and 56, the Answer of West Virginia declares:

"In 1833 the Legislature of Virginia passed an Act similar to the above recited Act of 1822, except that it provided for the boundary line 'to commence at the Fairfax Stone, or at the First Fountain of the Cohongoruton, or at the North Branch of the Potomac River, and to run a due north course, etc.' And also that if Maryland failed to appoint Commissioners, then the Virginia Commissioners should run and mark the line, etc.

"The State of Maryland seems to have regarded the last Act of Virginia as a *refusal to accept her overtures*

for a settlement of the boundary question. On the 14th of March, 1834, the Legislature of Maryland adopted a resolution reciting 'that it is necessary for the peace and security of our people and the dignity of the State that our southern and western boundaries should be finally settled and defined. That this State has seen with deep regret the refusal on the part of Virginia to leave the settlement of these boundaries to friendly arbitration as proposed by this State': And then 'Resolved, that the Attorney-General of this State be and is hereby requested to cause suit to be instituted in the name of the State of Maryland against the Commonwealth of Virginia in the Supreme Court of the United States for the purpose of procuring a final legal adjustment and settlement of the southern and western boundaries.' It further provided for the employment of counsel and then resolved that 'all adversary proceedings on the part of the State against the State of Virginia *shall cease at any time before suit brought or judgment rendered, when that State shall accept the overture of Maryland made by her resolution at December Session, 1831.*' "

The Answer then recites the fact of the institution of the suit in October, 1834, "*for the settlement of the western boundary of said State,*" and then proceeds:

"On the 21st of March, 1835, the Legislature of Maryland passed a resolution reciting certain portions of a message of Governor Tazewell, of Virginia, *in which he states that the Act of Virginia, passed March 5, 1833, was intended as an acceptance of the proposition of Maryland in the amicable settlement of the question between the States,* and that the determination of Maryland to seek a decision of her rights by the judicial authority of the Union, was probably occasioned by a misapprehension of the terms of that enactment by Virginia, which

was susceptible of satisfactory explanation, etc. And then repeals the resolutions of 1833 by which the said suit was directed to be brought and directs the Attorney-General to discontinue all proceedings under the same. And also authorized the Governor of Maryland to transmit a copy of said resolution to the Governor of Virginia and communicate to the Government of Virginia the earnest desire of the State of Maryland *to settle and finally adjust the long pending question by amicable negotiations.*"

On page 55 of the Record, the Answer of West Virginia, having mentioned the dismissal of Maryland's suit in 1836, with the matter still open for adjustment, "by amicable negotiation," as above mentioned, goes on to state:

"After this the matter appears to have *rested without any definite action being taken* until the 27th day of March, 1852, when the Legislature of Maryland passed an Act (Acts 1852, Chapter 275)."

The Answer then sets out in full the Maryland Act of 1852, in which Maryland held herself out as ready, upon condition that Virginia would concur, to accept as the western boundary, a line "beginning at or near the Fairfax Stone on the North Branch of the Potomac River at or near its source;" it being expressly provided by Section 2 of this Act that the Commissioners to be appointed for running, locating, establishing and marking the line should make a record setting forth all the facts touching, locating and marking said line, and that the Commissioner of each State should forward a copy of the joint report to each of their respective Legislatures,

"and upon the ratification of said Report by the State of Virginia and the State of Maryland through their respective Legislatures, the said boundary line shall be

fixed and established and so remain forever, unless changed by mutual consent of the two States."

And the Answer further says that

"at the same session a similar act was passed by the Maryland Legislature in relation to the southern boundary of that State."

The Answer of West Virginia, continuing, further sets forth, on page 56 of the Record, the Act of Virginia of 1854, wherein the Maryland Act of 1852 was referred to and provision made for the appointment of a Commissioner to cause the said line to be accurately surveyed, traced and marked and to make a report setting forth all the facts touching the same to the respective Legislatures of the two States, and also expressly providing that

"Upon the ratification of such Report by the Legislatures of the States of Virginia and Maryland, the said boundary lines shall be fixed and established to remain forever, unless changed by mutual consent of the said States."

The Court will here note that not only is the boundary treated as an unsettled and disputed matter properly the subject of consideration and action by both States with a view to its ascertainment and settlement, but that such ascertainment and settlement are declared by the respective Acts of each of said States, and by language almost identical in both of said Acts, to be absolutely conditioned "upon the ratification of such report by the Legislatures of the States of Virginia and Maryland."

The Answer of the Defendant then goes on (pages 56, 57 and 58 of the Record) to set forth the appointment of Commissioners Lee, of Maryland, and McDonald, of Virginia; the employment of Lieutenant Michler, the running of the.

Michler Line, and the disagreement of the Commissioners and of the two States. And, further, that while Maryland was willing to adopt the Michler line and tentatively, under the legislation above referred to, which called for its ratification by both States before it became effective as a boundary between them, adopted and marked the Michler line, Virginia not only refused to ratify and adopt it, but dissented from it and rejected it, and having set up a widely divergent claim, as the Answer of West Virginia, on page 58, declares:

> *"owing to this difference in view, the Legislature of Virginia took no action on the Report of said Commissioners, but did adopt the resolution under which Mr. McDonald was commissioned to go to England to procure documentary and other evidence to establish the true boundary between Virginia and the State of Maryland."*

And the Answer further states that

> "Mr. McDonald sailed for England in June, 1860, and after that *never acted any further in conjunction with Mr. Lee, in locating, tracing and marking either the western or the southern boundary line of Maryland. Mr. McDonald procured a large amount of documentary evidence on these boundary questions and subsequently made a report and returned this evidence to the Governor of Virginia, etc."*

The Answer of West Virginia then (Record, pages 59-60), after pointing out, under the caption *"Difference between Michler's and Deakins' Lines,"* that "the Report of Lieutenant Michler shows that the meridian line run by him strikes the Pennsylvania line about three-quarters of a mile west of the old line run by Francis Deakins," proceeds (pages 59-60) to make the following declaration and admission, which the Plaintiff respectfully points to as a decisive and conclusive admission of the *fact* here under consideration, to wit, that

the controversy as to the western boundary is still pending, open and unsettled:

> *"After the Michler line was run and marked, the citizens of Maryland began to claim the right, in some instances to extend their holdings up to the Michler line, and in others to take up the land between said Deakins and Michler line. This has led to many disputes and to some serious conflicts and litigation, as Lieutenant Michler predicted it would.* EVER SINCE SAID MICHLER LINE WAS RUN AND MARKED AS AFORESAID, THE STATE AND PEOPLE OF MARYLAND HAVE CLAIMED AND INSISTED THAT IT WAS THE TRUE BOUNDARY LINE BETWEEN THE STATES. * * *
>
> *"The State of Maryland, first by the Act of 1818, and afterwards and much more clearly and conclusively by the Acts of 1852 and 1860, abandoned all claim or pretence of claim to the territory south of the North Branch of the Potomac, and since the Act of 1852, she has not only acquiesced in the claim of Virginia and West Virginia to their jurisdiction over the territory south of the North Branch, but she has insisted that the meridian line run by Lieutenant Michler from the Fairfax Stone to the Pennsylvania line is her true western boundary. Never since the formation of West Virginia has the State of Maryland asserted or set up any claim against her to the said territory south of the North Branch, until this suit was brought, nor had she asserted any such claim against Virginia from 1852 up to the date of the creation of the State of West Virginia.* THE ONLY DISPUTED BOUNDARY QUESTION BETWEEN MARYLAND AND WEST VIRGINIA SINCE THIS STATE WAS FORMED HAS BEEN AS TO WHETHER THE MICHLER LINE OR THE OLD DEAKINS LINE WAS THE TRUE BOUNDARY BETWEEN THE TWO STATES."

The Court will perceive that here is an admission as plain, as explicit, as unambiguous and certain as an admission could be, that up to the Michler line, at least, the boundary between Maryland and West Virginia, since the formation of the latter State, has been in dispute.

At this point the Plaintiff begs leave to stop for a moment and direct the attention of the Court to the fact that the Answer of West Virginia in the admission last above referred to, sets forth that the State of Maryland, "first by the *Act of 1818,* and *afterwards* by the Acts of 1852 and 1860" abandoned her claim to the territory south of the North Branch of the Potomac River, etc. The Court will remember that the action taken by the State under the Acts of 1852 and 1860 above refrred to, were clearly not final or conclusive, because neither Virginia nor West Virginia ratified the line which was run by Lieutenant Michler. So that the State of Maryland is remitted to the claim that she asserted by the Act of 1818 and repeatedly since then up to 1852, that the First Fountain of the Potomac River was *"the most western source of the North Branch of the Potomac"* and that this source was about a mile farther west than the Fairfax Spring.

The attention of the Court is next respectfully invited to the fact, appearing on page 65 of the Record, that the State of West Virginia has incorporated in and submitted as a part of its Answer to the Plaintiff's Bill the Maryland Act of 1890, under which this suit is brought, the object of which, as set forth in both the title and the text of said Act, as above pointed out, is specifically declared to be *"to obtain a decision of the Supreme Court of the United States which will settle the controversy between the States of Maryland and West Virginia over and concerning and which will finally fix and determine the true location of that portion of the boundary line between said States,"* etc.

The Court will next note at pages 373 and 374 and 375 of the Record, in the letter of Governor Henry A. Wise, submitted by his successor, Governor Letcher of West Virginia, on January 9, 1860, to the Legislature of Virginia, the report of "the actings and doings of the Joint Commission on the part of the States of Maryland and Virginia *touching the settlement of their boundaries,*" shows "the progress of the work and that it is *yet incomplete;* but enough is shown to present the *issues in controversy.*" Throughout this official communication the Court will find numerous references to the "boundary in dispute," and the subject is treated and discussed as a pending and undetermined controversy.

The attention of the Court is next respectfully invited to the statements and admissions in the Cross-Bill filed by West Virginia, June 1st, 1893, against the State of Maryland, and beginning at page 498 of the Record.

As bearing on the facts here under consideration, namely that the controversy as to the western boundary has been from its beginning regarded by both States as broken and pending, these admissions upon the part of West Virginia, as set forth in her Cross-Bill, speak for themselves so plainly and conclusively that we merely set them forth without comment, as follows (Record, page 500):

> "The State of West Virginia now comes and files this her Cross-Bill, and *says that there is a controversy between her and the State of Maryland as to the true location of that boundary line between the two States which runs southward* from the point of the intersection of the meridian of the first fountain of the Potomac River with the southern line of the State of Pennsylvania, and also as to the possession of and jurisdiction and control over the Potomac River so far as it extends between the two States."

Record, page 505:

"Said Act (Virginia, 1854) then directs the commissioners after running, locating, establishing and marking the said line, to make a report setting forth all the facts touching the same to their respective Legislatures, and then provided that:

" 'Upon the ratification of such report by the Legislatures of the States of Virginia and Maryland the said boundary line shall be fixed and established to remain forever unless changed by mutual consent of the said States.' "

Record pages 506-507, appointment of Commissioners Lee and McDonald—Michler's Line Run—Commissioners Disagree—McDonald sent to England.

Record, page 509: Maryland Claims to Michler Line.

Record, page 511:

"The State of West Virginia further complaining says that the true northern boundary line between her and the State of Maryland is the left of or northern shore of the Potomac River at low water mark, for the whole extent of that shore coterminous between Maryland and West Virginia, that is to say, beginning on the division line between the States of Virginia and West Virginia at or near Harpers Ferry, at low water mark on the left or northern shore of the Potomac River, and following said shore to the Fairfax Stone at the head spring of said river.

"*The State of Maryland claims that the said Potomac River to the right or southern shore at low water mark is within her territory and jurisdiction, and disputes the said claim of the State of West Virginia.*

"The compact made between Virginia and Maryland at Mount Vernon in 1785, mentioned in said answer,

simply provided for the exercise of certain privileges and rights of navigation and fishing in said river and for the service of process upon the same, and the punishment of crimes committed thereon, etc., BUT DID NOT SETTLE THE QUESTION AS TO WHICH STATE SAID RIVER BELONGED, NOR AS TO WHERE THE TRUE BOUNDARY LINE BETWEEN SAID STATES ALONG SAID RIVER IS LOCATED AND SAID QUESTION REMAINS UNSETTLED TILL THIS DAY."

The attention of the Court is next respectfully called to the various proceedings of the two States set forth in the answer of Maryland to the said Cross-Bill of West Virginia and appearing in the Record from page 528 to 535, including the Resolutions of the General Assembly of Maryland of 1832, the Act of Virginia of 1833, Resolution No. 80 of the Legislature of Maryland of March 14th, 1834, Report and Resolution No. 99 of the General Assembly of Maryland, pased March 21st, 1835. It will be noticed that Resolution No. 80 above referred to is entitled "Resolution relative to the *controversy between this State and the State of Virginia in regard to the southern and western boundaries.*"

In the Report and Resolution No. 99, it is said, among other things:

> "*The southern and western boundaries of Maryland have never been adjusted and defined, by compact with Virginia. We hold by a Charter, a charter which has been fully and solemnly recognized by the State of Virginia, but in the interpretation of that instrument, the two States have not been agreed.* It is right—even indispensable, that the interpretation should be settled, and the limits of the States ascertained, and our sister State cannot but sometime perceive that in that settlement her voice (admitted to be equal) is not entitled to preponderating influence.

"The State of Maryland seeks or desires nothing which is not hers of right, and it is necessary for her honor, that in her controversy, though amicable, and with her sister, the terms of adjustment shall not be dictated to her.

"A brief review of the proceedings of Maryland, would demonstrate that she has from time to time mildly reminded her sister State of her claims, and sought to refer them to the examination of commissioners, to be appointed by the parties, from among their own citizens respectively, desiring only to provide for the appointment of an umpire by one of our disinterested sister States, in the event of disagreement among the commissioners. In such propositions Maryland has evinced her confidence in the justice of her cause, but has suggested nothing imcompatible with the dignity of Virginia. She has desired, and still desires the peaceful ascertainment of her rights, never doubting but that Virginia would deem it necessary to her true glory to do right at whatever sacrifice, just that the relative rights of herself and neighbors should be equitably ascertained, and govern herself accordingly, without reckoning her means of resistance.

"The law of Virginia, before referred to, of March 5th, 1833, has been understood by us as not only not in accordance with, but directly repulsive of, the equitable and moderate wishes of Maryland, as an undertaking in truth by one of the parties, absolutely to settle and pronounce against the claim of the other.

"So regarding it, the State of Maryland determined to lay her controversy before the high and independent tribunal, empowered by all the States to hear and decide 'all controversies between two or more States;' and she has unshaken confidence that when the founders of the union agreed that all controversies between these States

should be settled by appeals to justice, and not to arms, they did not fail to achieve that peculiar and brightest glory of our country.

"*It is, however, gratifying to learn from a source entitled to so much respect, that we may have misconceived the proceedings and intentions of Virginia, and to be allowed to hope that she may yet do what may not be less advantageous and becoming to her than to Maryland.* It would be lamentable that false honor or strained punctilio should be permitted to estrange these States, or prevent the free course of explanation and liberal and just actions among them.

"That State will probably be regarded by posterity, as well as our contemporaries, as most loyal to the common welfare, and to it sown honor, which shall be most distinguished by forbearance and moderation; under the influence of these sentiments, your committee recommend that the 'door of explanation' which Virginia seems to consider closed upon her by the resolutions of the last session of the Legislature, be opened wide by their unconditional repeal, and the discontinuance of all proceedings under them; and that the Governor of this State be requested to communicate to the government of Virginia this intelligence, and to propose to reopen with that government *a negotiation for the final adjustment of this long-pending controversy, upon the basis of the resolutions of the General Assembly of Maryland, passed at December session, 1831,* and for *these purposes* your committee have proposed, and herewith report to the House, sundry resolutions.

"*Resolved by the General Assembly of Maryland,* That resolution No. 80, passed at December session, eighteen hundred and thirty-three, in relation to the southern and western boundaries of this State, and the controversy on that subject with the State of Virginia, be and

the same are hereby repealed, and the Attorney-General of this State is hereby directed to discontinue all proceedings under the same.

"*Resolved,* That the Governor be, and he is hereby authorized and requested to transmit a copy of the above resolution, without unnecessary delay, to His Excellency the Governor of Virginia, and also to communicate to the government of Virginia the earnest desire of the State of Maryland to close and finally adjust *this long pending question* by amicable negotiation."

We next respectfully point out to the Court further and additional matters set forth in the Answer of Maryland to the Cross-Bill of West Virginia, as bearing upon the point of fact now under consideration, and as showing that the boundary controversy remained open and unsettled up to the institution of this suit, namely, Record, pages 535-536, the Maryland Act of 1852; and the Virginia Act of 1854, providing for the running and adoption of a boundary line between the two States, subject to the ratification of such line by the Legislatures of both States.

And to the continuation of the Answer of Maryland on this subject (Record, page 537):

"Virginia, however, *instead of uniting in such ratification,* passed two resolutions upon the subject. The first provided for the erection of suitable monuments to mark Michler's line, and the second authorized the Governor to send an agent to Europe to collect record and documentary evidence 'tending to ascertain and establish the true lines of boundary between Virginia and the States of North Carolina, Tennessee and Maryland.' These resolutions demonstrate that the boundary up to that line was not settled or considered by Virginia to be settled; but, on the contrary, it was treated as still an open question.

"Upon this state of facts, this respondent is advised and therefore charges, that inasmuch as the offer of compromise made by her, by her said Act of 1852, Chapter 275, was not accepted, and the line as run by Lieutenant Michler was not ratified by Virginia, this respondent is clearly remitted to her original rights under her charter and the distinct recognition of her said boundaries thereunder by the Virginia Constitution of 1776, as hereinbefore shown.

"The civil war, which broke out in 1861, necessarily prevented, for a time, any further consideration of this boundary question; *but in 1868, the Legislature of West Virginia, obviously taking the ground that inasmuch as the Michler line had never been ratified by Virginia, West Virginia was not bound by it, and that the boundary question was still an open, unsettled question,* passed an act (Chapter 175) authorizing the Governor *to appoint a commission to ascertain the line between West Virginia and Maryland,* commencing at the Fairfax stone and running north to the Pennsylvania line, *and to communicate with the Governor of Maryland with a view of having a joint survey made.*

"No such joint survey was made."

And further (Record, page 538) setting forth the Act of West Virginia of 1887, whereby the Deakins Line was repudiated by her as a boundary and the controversy treated as open, and a settlement proposed that the Michler line was to be approved and confirmed as the true boundary line between the State of West Virginia and the State of Maryland, upon condition, however, that Maryland should pass an act or acts confirming and rendering valid

"all entries, grants, patents and titles from the Commonwealth of Virginia to any person or persons to lands situate and lying between the new Maryland Line hereby

established and the old Maryland Line *heretofore* claimed by Virginia and West Virginia," etc.

At which point the Answer of Maryland proceeds (Record, page 539):

> "The conditions of this Act were naturally not acceptable to and have never been accepted by Maryland, and being unable to bring to a final settlement her protracted controversy with Virginia, and subsequently with West Virginia, she shows that for the protection of her just rights, which she respectfully insists she has never abandoned, she has finally brought this suit to the end that by a decree of this Honorable Court, the question shall be definitely determined * * * For the sake of peace and the definite settlement of the line she was content, as shown by her said Act of 1852, Chapter 275, to have the line run from said Fairfax Stone, and when the line so run was ratified, to submit to the same. As heretofore shown, no such ratification was ever made nor was the location of the line ever agreed on. And, therefore, upon advice she charges that she is not concluded by said Act by what was partially done thereunder, but is still at liberty to assert her original rights."

Finally, the attention of the Court is called to the following paragraphs from the Report of the Maryland Historical Society, prepared by Prof. William Hand Browne, and the late Judge Albert Ritche, with regard to the status of the controversy since the running of the Michler Line (Record, pp. 585 to 588):

> "By application to the Federal government the services of an experienced engineer, Lieutenant N. Michler, were secured, and a line from the Fairfax Stone north to the Pennsylvania line was run and marked. This line, when ratified by both Legislatures, was to be the definite boundary.

"Maryland proceeded to ratify Michler's line by an Act passed March 6, 1860, Virginia, however, did not proceed to ratification. In the session of 1859-60 the Virginia Assembly passed two resolutions dealing with the subject. In the first they provided for the erection of suitable monuments to mark Michler's line; and in the second they authorized the Governor to send an agent to England to collect record and documentary evidence 'tending to ascertain and establish the true lines of boundary between Virginia and the States of North Carolina, Tennessee and Maryland.' From this it would appear that they considered the boundary question still open. At all events, the ratification required by the Act was not given, and Maryland was once more remitted to her original rights, her charter boundary and its acceptance by the Virginia Constitutional Convention.

"The outbreak of the war in 1861, and its resutls, changed the status of the question. The State of West Virginia was separated from Virginia, and in her boundaries (which were designated by county lines) were included those counties in which the disputed territory lies. It was with West Virginia, therefore, that the question would have to be settled.

"The Legislature of West Virginia, at the session of 1868, authorized the Governor to appoint a commission to ascertain the line between West Virginia and Maryland, commencing at the Fairfax Stone, and running north to the Pennsylvania line, and to communicate with the Governor of Maryland, with the view of having a joint survey made. The reason of this action was the fact that Michler's line having been found more favorable to Maryland than the old provisional, or Deakin's line, West Virginia took the ground that as Virginia had never ratified Michler's line, West Virginia was bound to nothing, and the question was still open.

"In 1884 the Maryland Assembly passed a resolution by which, after the statement that there was difficulty in ascertaining the exact location of Mason and Dixon's line, owing to the absence of marks, the members of Congress from Maryland are requested to use their influence to obtain an appropriation from the Federal government 'for the purpose of re-surveying and locating the said Mason and Dixon's line by marking said Mason and Dixon's line with suitable stone monuments, with the letters M. and V. between the States of Maryland and Virginia, M. and P. between the States of Maryland and Pennsylvania, M. and D. between Maryland and Delaware, commencing at the Fairfax Stone at the head waters of the North Branch of the Potomac, thence running northwardly with Mason and Dixon's line until it intersects the eastwardly line dividing the States of Pennsylvania and Maryland'—and so forth.

"As the action contemplated by this resolution was, on the face of it, impracticable, your committee have not thought it necessary to investigate what further steps, if any, were taken in the matter.

"In 1886, a resolution was passed in the Maryland Assembly to the effect that as Michler's line had not yet been adopted by West Virginia, the Governor of Maryland should be requested to bring the subject to the attention of the Governor of West Virginia, asking him to bring it before the Legislature of that State for such action as they might deem fitting.

"In the next year the Assembly of West Virginia passed an act confirming Michler's line, but not unconditionally. The Act was not to take effect until Maryland should have passed an act or acts confirming all Virginia patents to 'lands situate * * * between the new Maryland land hereby established,' and the old Maryland line heretofore claimed by Virginia and West

Virginia to the same extent and like legal effect as though the said old Maryland line were hereby confirmed and established."

"This clause introduces a new and important feature in the case. Michler's line differs considerably from the Fairfax stone more to the westward, and giving to Maryland, as your committee are informed, a wedge of territory three-quarters of a mile at the base and thirty-seven miles long. All the lands within this wedge, your committee are informed, are covered by grants from Virginia and a considerable part of them by grants from Maryland. Maryland is therefore called upon to annul her own grants and oust her own citizens from her own acknowledged territory as a condition of getting back a small fraction of the lands of which she has been despoiled.

"In 1888 the question arose again in the Assembly of Maryland. On March 13, a resolution was passed in the Senate to the effect that whereas, while Maryland had ratified the Michler line of 1859, Virginia had never done so; and whereas Maryland had endeavored, without avail, to induce West Virginia to adopt it, or to settle the matter by a joint commission, that State had not complied,— that now the Attorney-General of the State be applied to, to advise the proper remedy.

"The Attorney-General replied (March 17) saying:

"'In my judgment, no definite settlement of that matter can be accomplished by the appointment of Commissioners, or by negotiations between the Legislatures of the respective States. The controversy has been going on for more than a century, and the State of Maryland has appointed commission after commission to make such adjustment, but all to no purpose.' * * *

"'In my judgment, therefore, there are but two courses open to bring this long-pending controversy to

an end. One is for the State to cause proceedings to be taken against the State of West Virginia in the Supreme Court of the United States for the purpose of procuring a final legal adjustment and settlement of the boundary line between the States; and the other is to submit the matter in controversy to arbitrators appointed by the States.'

"He concluded by recommending the passage of an act providing for an arbitration, and submitted the draft of such an act.

"The bill was introduced in the Senate on March 19, and referred to the Committee on Federal relations.

"We may infer that upon mature consideration it was judged inexpedient to entrust a decision of so much moment to the State to the judgment of a single man (since this is what an arbitration usually comes to), and when the bill providing for arbitration was reported back to the Senate, it was reconsidered, and the enacting clause was stricken out.

"Thus stands the question at the present moment. Nothing final has been done since the Virginia Convention of 1776, which acknowledged the right of Maryland to her charter-boundary, and waived all claims that Virginia might have made to any territory within it, incorporating these words, for the great solemnity, in the Constitution of the State.

"In conclusion your committee beg to offer the following Resolutions:

"Resolved, that, in the opinion of this Society, it is highly desirable that the true western boundary of Maryland, which has been so long in dispute, should be equitably and finally determined; and this Society approves the view of the late John V. L. McMahon that the best mode of settlement is by a decision of the Supreme Court of the United States."

IV.

IN VIEW OF THE SOLEMN PLEDGE IN THE VIRGINIA CONSTITUTION OF 1776, REPEATED IN THE SUBSEQUENT CONSTITUTIONS, THAT SHE RELEASED AND RENOUNCED TO MARYLAND ALL TERRITORY WITHIN MARYLAND CHARTERED BOUNDARIES AND OF THE EQUALLY SOLEMN ACCEPTANCE BY MARYLAND OF THAT PLEDGE IMMEDIATELY THEREAFTER, EQUITY AND JUSTICE PRECLUDE ANY CLAIM BY VIRTUE OF ADVERSE POSSESSION UPON THE PART OF VIRGINIA OR OF WEST VIRGINIA HOLDING UNDER HER TO ANY TERRITORY WITHIN THE CHARTERED BOUNDARY OF MARYLAND, SO SOLEMNLY RENOUNCED.

Finally, in connection with this branch of the discussion, we beg to urge with all possible earnestness upon the Court, that the formal, solemn and comprehensive renouncement and release by the State of Virginia, when she assumed her independence, in 1776, of all claim to any of the territory within the chartered boundaries of Maryland, and the public and solemn acceptance of that pledge by the State of Maryland through her first Constitutional Convention in 1776, was of itself an irrevocable and final disclaimer upon the part of Virginia of any intention or purpose to acquire territory within the chartered boundaries of Maryland by adverse possession or prescription. This contention on the part of Maryland does not, of course, assume to predetermine the chartered boundaries of the State; but once the legal boundaries, as called for by the charter, being ascertained, it is respectfully submitted that under the solemn engagement made by Virginia to her sister State, as they were both entering upon war and revolution to assert their Independence, that she released and renounced all of the territory of Maryland within her chartered limits, and which engagement was afterwards followed by another solemn and public compact between the two States, namely the compact of 1785, Virginia and those holding title

under her, are precluded by every consideration of Equity and Justice from laying a claim to the very territories which they thus publicly declared that they would not lay claim to. This view of the case is presented in Maryland's Answer to Virginia's Cross-Bill, on page 534 of the Record, as follows:

> "This respondent shows that the said invasion of her territory by Virginia was never assented to or acquiesced in, and that when, in 1776, thirty years after the said unauthorized and *ex parte* setting up of said Fairfax stone, the Commonwealth of Virginia in her constitution, ceded, released and forever confirmed to the people of Maryland the territory contained within her charter, Maryland had a right to suppose and did suppose that such abandonment of said wrongful possession was deligerate and final and that no attempt would be made to set up in the face of such disclaimer of all right, a title by adversary possession.
>
> "The more especially too, was this view proper to be held, inasmuch as the said public declaration in the Constitution of Virginia was soon followed by the memorable compact of 1785, between Maryland and Virginia, which in many of its articles, is a valid and subsisting compact to this day.
>
> "Nor can it be fairly supposed that so soon as two years after said compact and eleven years after said disclaimer by Virginia, Maryland could have entertained the idea that it would be withdrawn and repudiated and that the Deakins line would ever be claimed, by Virginia, as the true boundary between the two States."

And in the same connection the views of Maryland's eminent lawyer, Mr. McMahon, are respectfully urged upon the Court. These views appear as an exhibit filed with Maryland's Answer, in the Record, at pages 558-559, as follows:

> "By some the opinion is maintained, that as between independent states or nations, one can not acquire a title

to the domain of the other merely by prior occupancy. In the letter of Mr. Cooke above given, it will be seen that he adopts this doctrine, and asserts broadly, 'that if the claim of the State be well founded in its origin, no lapse of time nor continuance of possession on the part of Virginia can bar that claim.' The contrary opinion is maintained by Vattel: and is probably the correct doctrine as there explained and restricted. The doctrine of prescription can only apply to a case of clear and unequivocal abandonment of possession, on the one part, sustained by a proof of long, undisputed and uninterrupted adversary possession by the other; and this has never been the character of the Virginia possession. The claim was disputed from its very origin, and the territory was occupied under circumstances from which no inference of acquiesence, on the part of the proprietary of Maryland, can fairly be drawn. From the year 1753 to the revolution, the proprietary and his government continued to assert the Maryland claim, and were restrained from making grants of the disputed territory, only through apprehension of the interference of the crown, and because of the adjustment between the crown and Lord Fairfax. And if any doubts could arise from the possession of Fairfax, anterior to the revolution, they are all removed by the constitution of Virginia adopted in 1776, which in its 21st Article, after making claim reservations as to the navigation and use of the Potomac and Pocomoke, etc., expressly cedes and confirms to the State of Maryland: 'all the territory contained within its charter, with all the rights of property, jurisdiction and government, and all other rights whatsoever, which may at any time heretofore have been claimed by Virginia.' Thus then at the revolution, by the expres concession of the State of Virginia, the claims of Maryland to her charter limits existed in their

full force; and are sustained by an excess surrender of all counter claims which Virginia might have. The reservations made by her, have all been gratified by the compact of 1785: and the claims of Maryland, so far as they rest upon her charter, are therefore doubly armed. From that period to the present, it will be apparent, from the review of the transactions of the two States already presented that the claim of Maryland has never been relaxed except by an offer to compromise, which was not accepted, and therefore cannot in any wise affect her right: and that there is nothing in the character of the Virginia possession, from which an abandonment of this claim can reasonably be presumed."

V.

We next beg to present particularly to the Court the fact that the country in dispute is, with the exception of a few sporadic places, wild, uncultivated and unsettled. Thus, in the report by Professor Bauer, of the results of his work there in 1897, at pages 650-651 of the Record, he says:

"Both meridian lines are situated in a region but sparsely inhabited and run through dense forests and thick undergrowth, over high mountains and fog-laden glades. Camps had to be established at suitable intervals and provisions brought by wagon from Oakland over the mountain roads.

"As my own camp had generally to be located on mountain tops inaccessible to wagons, instruments, camp equipage and provisions had to be transported by hand. The safe and rapid transportation of the delicate instruments from mountain top to mountain top was always a source of great anxiety, as the slighest mishap would have caused considerable delay. The prevalent atmos-

pheric conditions, the state of the atmosphere being very unsteady and hazy during the day and raising fogs at night, made the procuring of long sights a trying and difficult matter within the extremely limited time at my disposal. I was due at the University of Cincinnati within two months after the actual determination of the meridians had been begun and there were two meridian lines, each 35-36 miles long, to determine and trace out, besides the making of magnetic observations. As no skilled assistance was available, I had to do all the observing and computing and such methods had to be adopted in the location of the lines as would make me as independent as possible of such assistants as had to be temporarily pressed into service. During the first part of the work there was considerable wet weather, and during the latter part, extensive forest fires filled the air with a dense smoke. The opening of the lines through the thick woods covering the mountain tops required, at times, heavy cuttings and thus caused vexatious delays. I traced the two meridian lines simultaneously and reached Mason and Dixon's line on October 15th, two months after my first camp."

Also at page 847, the Record shows Lieutenant Michler's description of the country, in which he says:

"The dense growth of timber along the line, the excessively rugged nature of the country, much more so than at first anticipated, the few cleared fields encountered in consequence of the doubt as to the exact locality of the line, the difficulty of transportation and many other reasons, all caused a great deal of delay, and rendered the expenses of the work much greater, than at first estimated for."

And at page 977 of the Record, in Mr. Brown's Report, it is said:

> "It is worthy of note that up to the time of the institution of the present suit the whole region for miles around all the headwaters of the Potomac was a wilderness, covered by virgin forest, and even today, there are deer and bear in the woods and laurel thickets."

And Lieutenant Michler, Record pages 844-845, states that the meridian running north goes

> "over the top of some of the roughest and most inaccessible portions of those mountains; it passes oveer ridges and glades, and the narrow pent up valleys of several mountain streams flowing both to the east and to the west, and occasionally through some open fields. There were very few clearings along it; in the first place the country does not become very thickly settled until north of the Railroad, and in the second place many portions of lands along it are so indifferently poor, that, as long as so much better is to be found, but little inducement is offered to settle there. *Again, so much doubt existed among the inhabitants as to the true position of the line that many were deterred from making any improvements along it.*"

And see also the testimony of R. T. Browning, Record, pages 1112-1113; testimony of W. McCulloh Brown, Record, page 1005; testimony of Falkenstein, Record, page 1118.

VI.

MARYLAND HAS BEEN SUBSTANTIALLY IN POSSESSION UP TO THE MICHLER LINE AND WITHOUT INTENDING IN THE LEAST TO WAIVE HER CLAIM TO THIS OPEN CONTROVERSY UP TO THE POTOMAC MERIDIAN, WHICH SHE HAS NEVER RELINQUISHED SINCE SHE DEFINITELY ASSERTED IT BY HER LEGISLATIVE ACT OF 1818, IT IS RESPECTFULLY SUBMITTED THAT THERE IS NO DOUBT AT ALL PRESENTED BY THE RECORD IN THIS CASE OF HER RIGHT TO GO UP TO THE MICHLER LINE.

Maryland's Holdings Up To The Michler Line.

So far as the territory up to the Michler Line is concerned, we think it will hardly be questioned that Maryland has been substantially in possession of that territory. To show, however, that such is the case we desire to direct the Court's attention to the testimony in the Record relating to a number of tracts of land lying contiguous to the Michler Line, which testimony shows beyond all doubt that almost all of these tracts have been and are held today under Maryland titles.

Siege of Acre Resurveyed.

The first of these tracts near the south end of the plat is the tract of land called "Siege of Acre Resurveyed." This tract of land was patented by the State of Maryland on the 22nd day of April, 1887, and runs along and with the Michler or Fairfax meridian. This patent is exhibited at page 880 of the Record.

Troas Resurveyed.

Going north along the Fairfax or Michler meridian, the next tract located upon the plat of the Plaintiff is a tract of land called "Troas Resurveyed," and was granted by the

State of Maryland, on the 22nd day of January, 1896, and calls to a post and stone pile on the Michler line and to run with said line north five hundred and forty perches to the third line of a tract of land called "Covent Garden."

These tracts of land, as located upon the plat of the Plaintiff, and as located upon the ground, extend along the Michler line from the point black letter "S" just south of where said line is crossed by Laurel Run, to a black circle in said Michler line north of the end of the first tie line, as indicated upon said map, and extend three and one-quarter miles along said Michler line.

Covent Garden.

The tract called "Covent Garden" is not located upon the plats of either the Plaintiff or Defendant, but in the testimony of H. J. Frear, found at pages 1620, 1621, 1622 and 1623 of the Record, it is shown that the Preston Lumber & Coal Company purchased the timber from the owners of the tracts Troas Resurveyed and Covent Garden up to the Michler line as held under the Maryland title for the land upon which said timber stood. This testimony is as follows:

"Cross-examination by Mr. Sincell:

"38 Q. In your capacity of land agent and civil engineer of the Preston Lumber & Coal Company, has it been a part of your duties to purchase lands and timber for the company?

"A. It has.

"39 Q. Have you ever purchased any timber for the Preston Lumber & Coal Company or any land for said company along or in the neighborhood of the Michler line?

"A. I have.

"40 Q. Do you know where a tract of land called the *'Resurvey of All the Chances'* lies?

"A. I do.

"Objection by counsel for the State of West Virginia.

"41 Q. Who owns said tract of land?

"A. Mr. D. E. Offutt.

"42 Q. Where does Mr. D. E. Offutt live?

"A. Oakland.

"43 Q. Do you know from what sovereignty the title to the tract of land called the 'Resurvey of All the Chances' comes?

"A. The State of Maryland, I understand.

"44 Q. Please state whether or not the Preston Lumber & Coal Company ever bought any timber from Mr. D. E. Offutt off of this tract?

"A. We did.

"45 Q. (By Mr. Price): Was the contract in writing?

"A. It was

"(Objection by the counsel for the State of West Virginia.)

"(By Mr. Sincell):

"46 Q. Up to what line or how far west did Mr. Offutt sell the timber off of that tract of land to the Preston Lumber & Coal Company?

"(Objection by the counsel for the State of West Virginia, on the ground that the written paper is the only proper evidence.)

"A. Up to the Michler State line.

"47 Q. What other tracts of land, if any, has the Preston Lumber & Coal Company, to your knowledge, bought timber off of on the east side of the Michler line?

"A. Purchased from William Bittner and from the Wilson Lumber Company.

"48 Q. What tract of land was it that you purchased the timber off of from the Wilson Lumber Company?

"A. Troas Resurvey.

"49 Q. From what State is that title derived?

"A. Maryland.

"50 Q. Up to what line did you purchase the timber from the Wilson Lumber Company?

"(By Mr. Price):

"51 Q. Was that in writing?

"A. Yes, sir.

"(Mr. Price): Then I object without the production of the writing.

"The witness (Answering Mr. Sincell's last question): Up to the Michler State line.

"(By Mr. Sincell):

"52 Q. Have you ever purchased any timber along the Michler State line and to the east of that line adjoining the line from any other tracts in Maryland for the Preston Lumber & Coal Company?

"A. I do not recall any other except William H. Bittner.

"53 Q. Do you know the name of the tract that he owns?

"A. I think it is a part of the 'Mount Pleasant,' or it is one of those that adjoin across there.

"54 Q. Is it 'Covent Garden'?

"A. Yes, sir; Covent Garden instead of Mount Pleasant.

"55 Q. Is that a Maryland or Virginia patent?

"A. Maryland, as I understand it.

"56 Q. Up to what line did you buy the timber on that tract?

"A. The Michler State line.

"57 Q. Please look at the map now shown you, being Map No. 1, prepared by the State of West Virginia in this case, and state at what point the point marked 'C1'

is located on said plat with reference to the lines running north and south on said map?

"A. It is about fifty poles west of what I understand to be the Michler State line—east of what I understand to be the Michler State line.

"58 Q. Does said point strike any of the lines mentioned in this case as the State line?

"A. It is very close to what is commonly called the Deakins State line.

"59 Q. Is it or not according to this plat in the Deakins State line?

"A. I should so take it, that it is in the Deakins State line, if I understand this plat correctly. Is this the Deakins State line?

"(Mr. Price): This line is the line Mr. Monroe ran.

"The witness: At the time I made this location on my map according to this plat (indicating).

"60 Q. It shows it to be right in Mr. Monroe's reference line, does it not?

"(Mr. Monroe): My reference line ran right between those two points.

"61 Q. The question is, is it or not in the Deakins State line according to this plat?

"A. I do not know where the Deakins State line is on this plat, unless it should be this line (indicating).

"62 Q. Please look at the plat which you have prepared, and have testified to, and state where said point appears upon your plat with reference to the Deakin Old State line?

"A. Just a very few rods west.

"63 Q. How many rods west?

"A. I should think in the neighborhood of ten.

"64 Q. Now, will you state whether or not the location upon the map No. 1 and the map you have prepared of that point correspond?

"A. They seem to correspond.

"65 Q. Have you measured the distance on map No. 1, from the Michler line to the point C1?

"A. I have not.

"66 Q. Will you please do so. What is the distance?

"A. (Measuring on map.) It seems to be about forty-five or fifty rods.

"67 Q. Is it forty-five or fifty?

"A. Well, it is between the two—about fifty rods.

"68 Q. Please look at your map and state what the distance is?

"A. It seems to be about forty-three or forty-four rods.

"69 Q. What is the distance according to your plat between the Michler State line and the Deakins old State line as you designate it on your plat?

"A. Just a trifle over fifty rods or about fifty rods.

"(*Re-direct Examination by Mr. Price*):

"70 Q. When did the Preston Lumber & Coal Company purchase from Mr. Offutt the timber on the land opposite Benjamin Miller's property, of which you have spoken?

"A. About 1902, or 1903.

"71 Q. About 1902 or 1903?

A. Yes, sir.

"72 Q. Where is Benjamin Miller?

"A. Benjamin Miller is dead.

"73 Q. Who owns the land opposite this Offutt land on the West Virginia side?

"A. Benjamin Miller's estate.

"74 Q. Do you know to what line they claim?

"A. They claim, as I understand it to the Deakins Line.

"75 Q. Then Offutt sold to the Preston Company timber on land between the Deakins line and the Michler line claimed by the heirs of Benjamin Miller?

"A. Yes, sir; and also claimed by Mr. Offutt.

"76 Q. The Wilson Lumber Company timber which was purchased by the Preston Lumber & Coal Company—at what point on Map No. 1 in this cause would that be?

"A. It would be designated as lying directly north of the Backbone mountain for a distance of about two miles.

"77 Q. Who owns the land on the West Virginia side along there?

"A. Owned by the heirs of Stalnaker—J. W. Stalnaker, I think.

"78 Q. Who owns the timber on those lands?

"A. The Preston Lumber & Coal Company.

"79 Q. Did they purchase the Stalnaker title in there?

"A. Yes, sir.

"80 Q. The timber?

"A. Yes, sir.

"81 Q. So that if they bought from the Wilson Lumber Company on the Maryland side up to the Michler line, they bought from the Stalnaker title on the West Virginia side up to the old Deakins line, did they?

"A. With the Stalnaker's I do not know that the question was ever raised with reference to the State line, and I think the Stalnakers only deeded up to the Michler State line.

"82 Q. But the Preston Lumber & Coal Company owns the timber on both sides?

"A. Yes, sir; the timber on both sides.

"83 Q. Therefore no question can arise against itself from itself as to the ownership of the timber between those lines?

"A. Not on those tracts I can't, no sir.

"84 Q. When did you buy the timber from the Wilson Lumber Company?

"A. They bought the timber from the Wilson Lumber Company about 1896.

"85 Q. And when did they buy from Stalnaker?

"A. About—a short time previous, about 1895.

"86 Q. And when did they buy from W. H. Bittner?

"A. About the same time—about 1895.

"87 Q. Do they own the timber on the West Virginia side opposite the Bittner land?

"A. Not at the present time. That has been lumbered off.

"88 Q. They did own it?

"A. Yes, sir; they did own it, bought it from the Stalnakers.

"89 Q. The Stalnakers land lies opposite the Bittner land also?

"A. Yes, sir.

"90 Q. So that there can be no conflict as to that timber growing out of the Maryland State line?

"A. No, sir.

"91 Q. Did the Preston Lumber & Coal Company purchase any land from Loar?

"A. From Mrs. Mary Loar, yes, sir.

"92 Q. Where does that lie?

"A. It lies in Preston county, West Virginia."

It will thus be seen that extending all the way from the south end of Troas Resurveyed up to the tract called "Mt. Pleasant," as located upon the plats of the Defendant, and on the east of and up to the Michler line, people holding said land under the Maryland grants above mentioned, exercised their right to sell and dispose of their property without such

right being called into question by anybody claiming to hold under a grant from the State of Virginia or the State of West Virginia.

In point of fact, it will be apparent, from an inspection of the Defendant's Map No. 2, that the States of Virginia and West Virginia have not undertaken to grant title to the land lying on the east side of the Michler line between the points above mentioned, except in one case, that of the Francis and Williams Deakins tract of two hundred and fifteen acres, but as shown by the testimony of Mr. Frear, above set forth, it is apparent that there has never been any exercise or attempted exercise of authority, jurisdiction and control on the part of the Defendant over the land embraced within the points of that patent east of said Michler line.

Mount Pleasant.

The beginning of the tract of land called "Mount Pleasant," according to the testimony of Mr. Monroe, found at page 1639 of the Record, was pointed out to him by Daniel Gnegy, and said beginning point, according to its location upon the maps of the Defendant, stands in said Michler line. And at pages 1724-25 of the Record, upon cross-examination, Mr. Monroe admits that, as he has located the tract of land called "Mount Pleasant" upon his map, it is all, so far as he knows, held under the Maryland grant; and that Daniel Gnegy, the witness who pointed out said beginning to him, holds under the Covent Garden title, which is also a Maryland grant, and that the same lies south and west of the Mount Pleasant tract, which carries the same westward across and beyond the Fairfax or Michler meridian.

It is not contended by the Defendant that, between the tract called "Mount Pleasant" on the south and the tract called "The Royal Charlotte" on the north, the State of West Virginia makes any claims or pretensions to any of the land

between said points just mentioned on the east side of the Michler line, and the land or territory between said points is admittedly not covered by any Virginia grant except where the Pettyjohn Survey of 400 acres very slightly laps over to the east of said Michler line.

The Royal Charlotte.

On the 14th day of May, 1787, the State of Maryland granted to Thomas Hall a patent for the tract of land called "The Royal Charlotte," containing 2,000 acres. (See Record, page 660.)

By a deed dated the 25th day of March, 1789, Thomas Hall conveyed to Robert Morris said tract of land called "The Royal Charlotte" (See Record, page 661).

On the 7th day of September, 1797, Robert Morris and wife conveyed to George and John Graham, executors, said tract called "The Royal Charlotte" (See Record, page 662).

On the 26th day of May, 1814, the Grahams, executors, conveyed to Samuel Vincent, administrator, the said tract called "The Royal Charlotte" (See Record, page 665).

On the 15th day of November, 1816, Samuel Vincent conveyed the said tract called "The Royal Charlotte" to William Lorman (See Record, page 670).

On the 1st day of May, 1824, William Lorman conveyed the said tract called "The Royal Charlotte" to Robert Oliver (See Record, page 674).

On the 10th day of January, 1834, Robert Oliver conveyed said tract called "The Royal Charlotte" to Charles Oliver (see Record, page 667).

All of the deeds above referred to from the patentee, Thomas Hall, down to Charles Oliver, conveyed the entire tract of 2,000 acres without reference to any claim of title or possession on the part of any one claiming by, through or under any grant from the State of Virginia as covering any of the land embraced within the lines of the said tract called "The Royal Charlotte."

Eelshine.

The tract of land called "Eelshine," which was granted by the State of Maryland, lies west of Lots Nos. 316, 317 and 318, and is located upon the plat of the Defendant and extends to the said Michler line.

William Ashby 300-Acre Tract.

The testimony of Parker Ashby, pages 1424, 1425, 1426 and 1427 of the Record shows:

First.—That he resides in Garrett county, Maryland.

Second.—That he resides within the lines of the original William Ashby 300-acre tract granted by the State of Virginia, and has been living there since 1854; that his father, Thomas L. Ashby, lived there from 1854 to the time of his death in March, 1896.

Third.—That a portion of the William Ashby 300-acre tract was taken up under a Maryland grant made to John Saucer.

Fourth.—That Parker Ashby and his brothers recognize the Michler line as the State boundary line.

Fifth.—That some persons ran the old line in one place and some in another.

The testimony of Dorsey Ashby, found at pages 1427, 1428 and 1429 of the Record, shows:

First.—That he lives between the old and new Maryland lines.

Second.—That he votes in Maryland.

Third.—That he is assessed with his personal property and everything in Maryland, and that he owns land clear past all the lines in West Virginia, and that his stock on said land is assessed to him in Maryland; and that Mr. Offutt holds to the new line just below Ashby's land.

The new line referred to here by this witness is the Michler line.

Resurvey of all the Chances.

The tract of land called the Resurvey of All the Chances referred to in the testimony of H. J. Frear, page 1620 of the Record, is a tract of land patented by the State of Maryland about 1860 to William Schley, and extends from about the north end of the Ashby 300-acre tract to the north end of the Hooker tract, as located upon the map of the Plaintiff, running along the Michler Line.

The Diadem.

On the 3rd day of December, 1791, the State of Maryland granted title to the tract of land called the Diadem, containing 1696 acres (See Record, page 704). This tract is located upon the maps of both Plaintiff and Defendant.

On the 1st of August, 1794, the patentees covered *inter alia* the said tract called the Diadem to Mary Bond (see Record, page 705).

On the 6th day of September, 1794, Mary Bond and husband conveyed *inter alia* the tract of land called the Diadem to Benjamin Stoddert (See Record, page 708).

On the 6th day of August, 1802, Benjamin Stoddert conveyed *inter alia* the tract of land called the Diadem to Abraham Van Bibber (see Record, page 711).

By the last Will and Testament of Abraham Van Bibber, duly admitted to probate and record in the office of the Register of Wills, in Baltimore, Maryland, said tract called the Diadem was devised to Sarah Ann Jolley and Louise Jolley as tenants in common (see Record, page 717).

On the 4th of September, 1839, William I. Wallis conveyed all his right, title and estate in and to said tract called the Diadem to John Crane (see Record, page 722).

On the 26th day of September, 1842, Sarah Ann Jolley Campbell conveyed all her right, title and estate in and to

said tract called the Diadem to John Crane (see Record, page 721).

By these conveyances, from Sarah Ann Jolley Campbell and William I. Wallis, the title derived from the State of Maryland for the tract of land called the Diadem, became vested in John Crane. After the death of John Crane on the 4th day of May, 1864, Nancy Crane and others, the heirs-at-law of the said John Crane, conveyed to Joseph Feather, 676½ acres of the land owned by the said John Crane, and the same is described in the said Deed as lying partly in Preston County, West Virginia, and partly in the adjoining County of Allegany, in the State of Maryland.

The Defendant produced as a witness M. E. Feather, whose testimony is found at page 1457 of the Record; J. W. Feather, whose testimony is found at page 1460 of the Record; and Ethbell Falkenstein, whose testimony is found at page 1464 of the Record, all of whom testified that they acquired title from John Crane or the John Crane heirs for the land which they respectively held.

An inspection of the Plaintiff's plat No. 1 will show that the lands of these witnesses are within the lines of the said tract called the Diadem, and that the holdings extend west of the Michler Line for a very considerable distance. And these lands are the same which were conveyed to Joseph Feather by the heirs of John Crane, as noted above.

It will thus be seen that the holding of a very considerable portion of the Diadem tract is under the Maryland grant, and the possession thereof is referable to the Maryland title to said tract of land.

It is further shown by the testimony of Mr. Monroe, at page 1714 of the Record, that Ethbell Falkenstein bears allegiance to the State of Maryland.

White Rock.

On the 23rd day of December, 1881, the State of Maryland granted title to the tract of land called White Rock, located upon the ground and upon the plat of the Plaintiff and which extends, for its western boundary, along the Fairfax or Michler Meridian for a distance of 1281 rods or 4 miles. At the point within the lines of said tract indicated by the black letter, "W. R." and circle, the house stood where an assault was committed upon Austin Brown, a deputy Sheriff or constable of Garrett County, Maryland, on the 2nd day of September, 1886. Marshall Reckard, the party who committed the assault, was apprehended and brought before the Circuit Court of Garrett County, Maryland, for trial and the record of proceedings in the case is exhibited at pages 978, 979, 980, 981, 982, 983, 984 and 985 of the Record.

The attention of the Court is especially called to the Prayers which were submitted on the part of the prisoner found at pages 983-4 of the Record, and those which were offered on behalf of the State, as found at page 984 of the Record.

It will be noticed that upon the plea in abatement offered by the traverser, the issues were joined and the question as to the jurisdiction of the Court in the premises was distinctly raised. And by the ruling of the Court upon the Prayers, the jurisdiction of the Court was declared to extend to the Fairfax or Michler Meridian.

Elder Spring.

This tract of land was granted by the State of Maryland to Francis Deakins by letters patent bearing date February 15th, 1786. By his last Will and Testament, duly of probate and record in the office of the Register of Wills for the District of Columbia, and exhibited at page 774 of the Record, he devised said tract called Elder Spring to his nephew, John Hoye. John Hoye conveyed this tract *inter alia* to

William Hoye (see Record, page 729). The chain of title and the several conveyances from Francis Deakins, the patentee, to the present tenants in possession, are fully set forth in the Record at pages 724-786.

In the Brief filed by West Virginia in this case, at page 235, etc., some confusion seems to be shed upon the status of the tenancy and possession of the tract of land called Elder Spring. The status of the tenancy and possession of this tract is absolutely free from all uncertainty and doubt. The whole of the tract, without any exception at all, has always been held and is held at this time under Maryland patents and grants, and there is not a single person occupying any portion whatever of the tract who holds under a Virginia grant or patent, but on the contrary, as appears by the Record, without the least vestige of doubt about it, every person occupying the tract or any part of it, holds his land under a Maryland title.

Having stated this, we beg to refer again to the part of the Brief of the Defendant above referred to as tending to introduce some confusion upon this subject and to define to the Court, so that it may be clear, exactly what the effect of what is stated in the Brief of West Virginia upon the subject is.

On page 239 of the Defendant's Brief it is stated:

> "This Elder Spring patent is completely covered and included within the bounds of the Henry Banks patent for 8,000 acres filed in this cause as Monroe's Exhibit No. 28 (Record, page 1806)."

The description of the Henry Banks patent referred to is then set out at length in the Brief.

No evidence will be found in the Record of any holding whatsoever under the Henry Banks patent above referred to, within the limits of Elder Spring. But the holding within

the boundary of said tract is referable to the title derived from Francis Deakins as the patentee of the State of Maryland. That no possession under the Henry Banks 8000 acre patent was ever held within the limits of the tract called Elder Spring, will appear by reference to the chain of title above set forth, wherein it will be found that from the time of the issuance of the patent by the State of Maryland to Francis Deakins on the 15th day of February, 1786, no one who has ever held a portion of the Elder Spring has ever claimed under or taken any notice of the patent issued by the State of Virginia to Henry Bank for the 8000 acres above referred to.

That portion of the tract designated "E. A." and containing 111 acres is now held by Martha J. Faulkner, and according to the testimony of Samuel Faulkner, her husband, found at page 1149 of the Record, he states: That he lives on part of the tract called Elder Spring, in Garrett County, Maryland; that he knows the beginning of said tract and has known it since 1858 or 1859, and he pointed out the beginning of said tract to Mr. Brown, the surveyor on the part of the Plaintiff in this case; that this land extends west of the Michler Line; that he bought this property in the spring of 1864 and that he pays his taxes in Maryland for the entire portion of the tract he owns and that he has always paid his taxes on this tract of land in Maryland, and that his title is on record in Maryland; that from twenty-five to thirty-five acres of this part of Elder Spring lies west of the Michler Line (see Record, pages 1149 to 1154).

It will be seen by reference to the Plaintiff's maps that the subdivision of said tract called Elder Spring marked "E. A." on the plat extends west of the Michler Line, as testified to by the witness Samuel Faulkner.

That portion of the Elder Spring tract marked "E. B." upon the map of the Plaintiff is owned by Jeremiah Bittner. Mr. Bittner was called as a witness by the Plaintiff, and his testimony at pages 1141 to 1145 of the Record shows: That

he resides in Garrett County, Maryland; that he owns and lives on a part of the tract called Elder Spring; that he pointed out to Mr. Brown the end of the second line of said tract and that he has lived on said land for thirty-seven years; that his Deed is recorded at Oakland, Maryland; that he owns sixty acres of the Elder Spring tract, as near as he can remember, and that he has known the land for fifty years, and that it has always been held under Maryland title; that the Pritchard Farm is a part of the Elder Spring tract; that it lays across the Michler Line; that Thomas Lewis used to own the farm adjoining him and that Lewis paid his taxes in Garrett County, or as it was at that time, Allegany County; that Samuel Faulkner owns a part of the Elder Spring tract and that he claims Maryland and votes there and sends to school in Maryland and that Faulkner has done so for thirty-four or thirty-five years, and that the witness, Bittner, has always voted in Maryland ever since he had a vote, and that at the time of the giving of his testimony he was sixty-seven years of age.

That portion of the Elder Spring tract designated "E. C." on the plat of the Plaintiff, is owned by Marshall Friend, who was a witness in this case and who testified, at page 1140 of the Record, that he owns 50 acres of the Elder Spring tract. The witness further stated on page 1482 of the Record that the 50 acres of the Elder Spring tract owned by him were assessed for taxes in Garrett County, Maryland. And at page 1138 of the Record he testified that for quite a while he voted in Virginia, but for the last four or five years he has been voting in Maryland.

That portion of the Elder Spring tract, designated "E. D." upon the plat of the Plaintiff is now held by Edward Jones, who derived his title from the widow of Thomas Lewis, the same party referred to by the witness, Jeremiah Bittner in his testimony. This witness stated that he had his Deed recorded at Kingwood, West Virginia; that before

witness had his Deed recorded in Kingwood, the prior owners did not pay taxes for but 40 acres in Maryland; that they had gone to Oakland to have some permission in some way in reference to having their children sent to school and paid the personal property tax on 60 acres in Virginia, and paid taxes on the remainder of the 100 acres in Garrett County, and that on that portion of his land laying west of the Michler Line he paid taxes on the same in West Virginia; that parties by the name of George and Thomas Spills, the owners of that portion of the tract called Elder Spring, designated "E. E." on the plat of the Plaintiff, pay taxes on the same in West Virginia.

In connection with this reference to the Spills as owners of the part of said tract designated "E. E." on the plat, we desire to call the attention of the Court to the statement in the Brief of the Defendant that the Spills voted in West Virginia and to say that there is absolutely no evidence in the Record that such is the case.

From the aforegoing review of location and testimony, it will be apparent to the Court that the State of Maryland has exercised jurisdiction up to and beyond the Michler Line over a very considerable portion of the lands laying along and beyond said Line and there has not been such a possession under Virginia title, and allegiance to the State of West Virginia by the inhabitants living along and in the neighborhood of the Michler Line as would support the statement of the Defendant, that in only two or three instances have persons acknowledged allegiance to the State of Maryland and claimed title derived from that sovereignty within the territory in dispute in this case.

VII.

A FULL COMPARISON OR CONTRAST OF THE NATURAL, PHYSICAL AND GEOGRAPHICAL FEATURES OF THE FAIRFAX AND THE POTOMAC STREAMS AND THE POTOMAC STREAMS AND THE RESPECTIVE SPRINGS AT THEIR HEADS, TENDING TO SHOW WHICH SHOULD BE CONSIDERED THE TRUE SOURCE OF THE RIVER.

As a preliminary to the statement of facts, we quote the Record to show that Maryland's data were obtained from *actual survey,* and that West Virginia *made no location west* of the Fairfax Meridian:

By direction of counsel, Mr. Brown, the surveyor on behalf of Maryland, *made actual survey of all the waters of the Potomac west of the Fairfax Meridian and took exact elevations of the several points.*

Instructions.
Record page 902.

Surveys of river.
Record, pages 903 to 908, inclusive.

Laurel run.
Record, pages 916 to 918.

Mr. Monroe, the surveyor for the defendant, did not survey any of the waters of the Potomac river west of the Fairfax Meridian, but adopted the surveys and locations of Mr. Brown, and has thus laid down the streams upon defendant's plats.

Record, page 1705:

"871st Q. Did you from that point where you crossed the river survey the river, and its main branches above there?"

"A. I was with Mr. Brown when he surveyed it. I did not myself."

Elevations.

Record, pages 926 to 933.

The surveys were made along the southern or right bank of each stream proceeding from its source.

Record, page 1710:

"939 Q. Did you run the main body of the Potomac river further down the stream than the point indicated on your map?"

"A. I did not."

Record, page 1721:

"58th Q. Did you locate the river west of the line where you crossed it?"

"A. I laid this down from Mr. Brown's notes of the survey. I was present when Mr. Brown ran it."

"60th Q. Then you adopted Mr. Brown's locations of the streams west of your line, did you not?"

"A. I did; laid it down from his survey."

From the surveys of the streams made in this case by the Plaintiff, and shown upon our maps, it will be seen that the head of the North Branch of the Potomac River is formed by the union of two principal streams, which unite about 5 miles east of the Fairfax Meridian at the point marked "W. A. S." upon our map. (Record, pages 904 to 923.)

The course of the streams is practically parallel, and they both head near the summit of the Back Bone Mountain, not far from each other, and at once assume the general course of the river; the northernmost stream is called Laurel Run and so shown upon the map; the southern is accepted as the river

proper. (Record, page 910 to 916, 975, 916 to 923, 1002; see also Map No. 1.)

As it nears the mountain, the river forks again at Station 31, one prong curving around to the south and east and heading at Fairfax Stone, while the other takes a northwesterly course toward the Back Bone Mountain, with its head at Potomac Spring. (Record, pages 973, 1043.)

(Before reaching the meridian of Fairfax Stone, the South Prong leaves the river, its head spring being marked by letters "Oct. 24".) (Record, page 924.)

The facts which led to the running of a meridian line from the Potomac Spring in this cause are:

1st. That the Potomac Spring was ascertained to be the most westerly spring of the North Branch of the Potomac River. Being found by survey to be 5978.56 feet west, and 7220.99 feet north of the Fairfax Stone and spring. (Record, page 997.)

2nd. It is slightly the longer stream, taking their measurements from the forks at Station 31:

Potomac Stream..... 6477.7 feet or 1.23 miles.
Fairfax Stream..... 6418.8 feet or 1.21 miles.

58.9 feet

(Record, pages 974, 996.)

3rd. It was found to be at a greater elevation above tide than the Fairfax Spring:

Elevation Potomac Spring. 3287.1 feet above tide.
" Fairfax Spring.. 3162.4 feet above tide.

124.7 feet above tide.

(Record, pages 929, 929.)

4th. It is practically upon the summit of the Back Bone Mountain which forms the main water shed.

Distance of Potomac Spring from crest of mountain..... 301.3 feet.
Distance of Fairfax Spring from crest of mountain..... 9000.0 feet.

8698.7 feet.

(Record, page 910.)

While comparing the relative elevations of these Springs with the Summit of Back Bone Mountain:

Summit of Back Bone Mountain..3356.3 feet above tide.
" Potomac Spring.....3287.1 feet above tide.

69.2 feet.

" Back Bone Mountain..3356.3 feet above tide.
" Fairfax Spring.....3162.4 feet above tide.

193.9 feet.

5th. That the volume of running water from our measurements showed to the advantage of the Potomac Stream. These measurements were made from the forks at Station 31 at intervals of 10 feet for a distance of 300 feet, up each stream.

Adding together all the measurements and taking their average, we found the average width of running water as follows:

Potomac Stream..... 9.14 feet wide.
Fairfax Stream..... 8.20 feet wide.

.94 feet.

(Record, pages 934, 1000.)

6th. From Maryland's surveys, and the latitudes and departures of points observed, it was found that a meridian run north from Potomac Spring would within 495.9 feet cross the summit of the Back Bone Mountain and leave all the waters of the Potomac Valley to the south and east (Record, pages 935, 936), while a meridian run north from the Fairfax Stone would cross the main stream at 4020 feet and Laurel Run and its branches still further north, leaving waters of the Potomac 1.9 miles west of the meridian thus run.

7th. That the Potomac Spring is a strong, lasting spring, while those at Fairfax Stone are weak and often go dry.

Testimony of W. McCulloh Brown, Record, page 994.

Testimony of George L. Mosser, Record, page 1106.

While Mr. Monroe, the surveyor on behalf of West Virginia, repeatedly admits in his testimony and in his return, that he did not survey any of the waters of the Potomac River west of the Fairfax Meridian, but adopted the Plaintiff's locations as cited above (Record, page 1721), nevertheless he has undertaken to show that the Fairfax Stream is a little longer than the Potomac, and wider between its banks. Maryland denies the correctness of the methods employed to obtain his results. But, for comparison, we give his figures:

First, as to the length of the streams, Mr. Monroe measured each beginning at Station 31 in the center of the run, without making any survey or taking courses which would enable him to reproduce his work or put it upon a map. It was therefore of no practical value. Neither was his measurement of the centre of the stream in conformity with the call for the "Farther or Southern Bank" of the river, as given in Maryland's Charter.

Comparative measurements of Potomac and Fairfax Streams, from Station 31 (Record, p. 974) by Mr. Brown, and (Record, p. 1706) by Mr. Monroe:

Potomac.....	6477.7 feet.	6419 feet.
Fairfax.....	6418.8 feet	6730 feet.

It will thus be seen that while there was some difference caused by the method of measurement, there was no great difference in the actual result.

In an attempt to offset the measurement made of the water in the streams from Station 31, as made on behalf of Maryland, Mr. Monroe laid down reference lines for an equal distance of 300 feet from Station 31, but in taking his measurements of the stream he measured between the banks on either side, and not the *running water,* as was done by Maryland (Testing of Mr. Monroe, Record, page 1708); therefore, his map, No. 4, and his reports of the average width of the Potomac Stream, are valueless for comparison.

The Defendant's attempts to measure the water in vessels and to estimate the volume were a failure (Record, pages 1708-1709).

By comparison of the elevations of the four head springs, it will be seen that those which rise to the west and north are at the greatest elevation.

South Prong.....	3144.8 feet.	
Fairfax Spring.....	3162.4 feet.	
Laurel Run.....	3228.7 feet.	
Potomac Spring....	3287.1 feet.	(Record, page 974).

The Potomac Stream and Laurel Run head upon the mountain, and at once assume the general course of the river further down. (Record, page 916 and 929 to 933; also Map No. 1.)

By taking the Potomac Spring as the "First Fountain of the Potomac," the call in Lord Baltimore's Charter can easily

be gratified, to the further or southern bank, and that bank can be followed from source to mouth of the river.

From Fairfax Stone and springs, the stream first flows in a westerly direction, then gradually curves to the northwest, west, northeast and east, forming a semi-circle, and crossing a meridian from Fairfax Stone 4020 feet north of the Stone. (Record, pages 903, 906, 975, 995, 1017.) Thus at Fairfax Stone the true southern or right bank of the river is upon the north or nearer bank, and the call of the Charter is not satisfied; while should the Fairfax Stone be taken as the starting point of the meridian, and it held that Maryland did not hold jurisdiction west of that meridian, the southwestern boundary of Maryland would not be at the Head Fountain of the Potomac River at all, but at a point nearly two miles from its source (Record, page 974), and where the river has become a stream of considerable size. (Record, page 906.)

VIII.

THE QUESTION OF THE TRUE LOCATION OF THE "FIRST FOUNTAIN" AS FIXING THE BOUNDARY BETWEEN MARYLAND AND WEST VIRGINIA IS, ACCORDING TO THE RESPECTIVE CLAIMS OF BOTH THE PARTIES IN THIS CASE, AN UNSETTLED AND OPEN ONE, AND IS PRESENTED FOR ADJUDICATION BY THIS COURT UPON THE CONSTRUCTION OF LORD BALTIMORE'S CHARTER AND THE RESPECTIVE CLAIMS OF THE "POTOMAC SPRING" AND THE "FAIRFAX SPRING" TO BE CONSIDERED THE FIRST FOUNTAIN, REGARD BEING HAD TO THE CHARTER CALLS FOR THE WESTERN AND SOUTHERN BOUNDARIES OF MARYLAND.

There being no compact between West Virginia and Maryland regarding the boundary between them; the Michler line never having been ratified; and the dispute over the boundary

between the two States being, as has been shown, admittedly open, unsettled and pending, Maryland is remitted to her claim that her western boundary is the meridian of the first fountain of the Potomac river extending from the Pennsylvania line to the most westerly spring of the river at the "Potomac Stone," and that her southwestern boundary begins at said spring and follows the southern bank of the stream to the beginning of the western line of Old Virginia.

As heretofore shown it is admitted that the Michler line was never agreed upon nor adopted by Maryland and Virginia or West Virginia, and, as plainly appears, *both States, parties hereto, are before the Court in this case disclaiming and denying that that line is a boundary or has ever been accepted or settled as a boundary between them and asserting that the proceedings taken in 1852, 1854, 1858 and 1860 were insufficient and ineffective to establish it as the boundary in question.*

The question being thus entirely open as to the Michler line, it becomes proper and necessary next to inquire into the state of the dispute prior to the Maryland Act of 1852 and the Virginia Act of 1854.

It is not only undisputed but asserted by both the parties to this controversy that in 1788, only 12 years after the disclaimer and release in the Virginia Constitution of 1776 and within three years of the Compact of 1785, Maryland claimed, so far as the North Branch of the Potomac River was concerned, that the spring at the Fairfax Stone was not the first fountain of the river but that its fountain was a spring farther to the west; that she asserted this claim repeatedly until in her Act of 1818 she formally promulgated it; that she did so again by her Acts of 1825 and 1832 and 1835 and that so the matter "rested" pending "amicable negotiations" until the Act of 1852 was passed proposing for the first time that the meridian of the Fairfax Spring

be accepted by both States—which proposal Virginia in 1859 and 1860 repeatedly refused to accept and which proposal, assuming that it was still open, West Virginia also repeatedly declined to accept, as she still peremptorily declines to do.

In support of the above statements, the plaintiff not only points to the distinct and undenied averments of her Answer to West Virginia's Cross-Bill and to proofs scattered all through the Record—but again adduces the clear averments made over and over again by West Virginia in her Answer, her Cross-Bill and various exhibits filed therewith—the more salient and conclusive of these averments—taken from a great number—being again reproduced for the convenience of the Court at this point, as follows:

On page 51 of the Record it appears that the Defendant, in its Answer, referring to the compact of 1785, between Maryland and Virginia, declares that although some of the provisions of the compact "had special reference to that part of the Potomac which is navigable and which lies below the limits of the State of West Virginia," adds *"but some of them apply to that River throughout its whole length* and at the time said compact was made the State of Virginia claimed to the North Branch of the Potomac and it was well understood that said compact related to said Branch and not to the South Branch so far as it was applicable to the River above the junction of said branches."

And on the same page of the Record and of the Answer only a few lines further down, the Defendant State declares that the North Branch was "recognized and accepted," by the compact of 1785, *"as the boundary line between the two States,* and it was so understood at that time and *has been so understood ever since* by the people living along said North Branch and by all the people of said States."

And on pages 51 and 52 of the Record, West Virginia in her Answer again says:

"And although the Legislature (of 1788) of that State (Maryland) in acting upon his (Deakins') report declares that said supposed boundary line is, in their opinion, far within that which that State might rightfully claim as her western boundary, yet, the language does not indicate that this Legislature intended to assert and claim to go to the South Branch, BUT RATHER THAT THE FAIRFAX STONE WAS NOT PLANTED AT THE TRUE FOUNTAIN HEAD OF THE NORTH BRANCH, AND THAT SAID FOUNTAIN HEAD WAS FURTHER WEST THAN SAID STONE, AND, AT A LATER DATE, AS WILL APPEAR HEREAFTER, THIS VERY CLAIM WAS MADE BY SAID STATE THROUGH HER COMMISSIONERS.

"In 1795, in 1801 and again in 1810 the General Assembly of Maryland adopted resolutions providing for the appointment of Commissioners to meet such persons as the State of Virginia should appoint *to adjust and settle by compact the southern and western boundaries of the State and fix the dividing line and boundaries, etc.*'

"The State of West Virginia says that she is informed that no commissioners were in fact appointed by Virginia in response to the resolutions of Maryland of 1795, 1801 and 1810, and that Virginia was not willing even to enter into a discussion of her right to the territory *between the two branches of the Potomac River,* and that, in fact, nothing was done by Virginia *until after Maryland passed the Act of 1818.*

"In 1818, the General Assembly of Maryland passed an Act (Chapter 206, Acts of 1818) proposing to Virginia the appointment of Commissioners TO SETTLE THE WESTERN BOUNDARY OF SAID STATE AND AGREEING TO ADOPT 'THE MOST WESTERN SOURCE OF THE NORTH BRANCH OF THE POTOMAC' as the point from which the western boundary should start.

"On the 28th of February, 1822, the Legislature of Virginia passed an Act (Chapter 14, Acts of 1822) which provides that 'the Governor, etc., is hereby authorized to appoint three Commissioners on the part of the State to meet such Commissioners as may be appointed for the same purpose *by the Commonwealth of Maryland to settle and adjust, by mutual compact between the two governments, the western limits of this State and the dividing line between this State and the Commonwealth of Maryland;* to commence at the Fairfax Stone on the headwaters of the North Branch of the Potomac River, and to run a due north course to intersect the line between this State and the State of Pennsylvania.' Said Commissioners were required to report their proceedings to the General Assembly *for confirmation or rejection.*

"Under these resolutions, Commissioners were appointed both by Maryland and Virginia, and they went to the Fairfax Stone in 1824. THE MARYLAND COMMISSIONERS REFUSED TO BEGIN AT THE FAIRFAX STONE, BECAUSE THEY CLAIMED IT WAS NOT AT 'THE MOST WESTERN SOURCE OF THE NORTH BRANCH OF THE POTOMAC RIVER.' THEY CLAIMED THAT THE MOST WESTERN SOURCE WAS A POINT ABOUT ONE MILE WEST OF THE FAIRFAX STONE, AND THAT THE DIFFERENCE BETWEEN THE TWO PLACES OF BEGINNING EMBRACED A SECTION OF COUNTRY ABOUT ONE MILE IN WIDTH AND THIRTY-SIX MILES IN LENGTH. The Virginia Act required her Commissioners to begin at the Fairfax Stone. This difference between the two Commissioners put an end to any further negotiations, and consequently nothing was done."

On page 53 of the Record, the Answer of West Virginia, continuing, further states:

"In 1825 the Maryland Legislature passed another resolution providing for the appointment of Commission-

ers and that the Governor of Delaware should act as umpire in case of disagreement, and in 1832 a Committee of the Legislature of that State made an elaborate report to the Legislature on the question of the boundary line of the State, in which what purports to be a history of the matter is given, and the various Acts and Resolutions of the Legislatures of the two States above mentioned are referred to. In speaking of the passage of the Resolution of 1818, above mentioned, by the Legislature of Maryland, the Committee says: 'This State had now become wearied with her efforts to reclaim the territory south of the North Branch, and hence this Act of 1818, Chapter 206, in proposing to Virginia the appointment of Commissioners, *agrees to adopt the most western source of the North Branch as the point from which the western boundary shall start.*' And the Report closes with a recommendation of certain resolution providing for appointment of Commissioners, and that the Governor of Delaware should act as umpire. This Report and the accompanying Resolutions were transmitted to the Governor of Virginia in June, 1832, and are found in the Journal and Documents of the House of Delegates of Virginia of 1832-1833."

The Answer of West Virgina then goes on to set forth the appointment of Charles J. Faulkner, Esquire, by the Governor of Virginia, under an Act of its Legislature of March 20th, 1832, to investigate and report upon the subject of the boundaries between the two States.

And then, beginning at the bottom of page 53 of the Record, and continuing upon pages 54, 55 and 56, the Answer of West Virginia declares:

"In 1833 the Legislature of Virginia passed an Act similar to the above recited Act of 1832, except that it provided for the boundary line 'to commence at the Fair-

fax Stone, or at the First Fountain of the Cohongoruton, or at the North Branch of the Potomac River, and to run a due north course, etc.' And also that if Maryland failed to appoint Commissioners, then the Virginia Commissioners should run and mark the line, etc.

"The State of Maryland seems to have regarded the last Act of Virginia as a *refusal to accept her overtures for a settlement of the boundary question.* On the 14th of March, 1834, the Legislature of Maryland adopted a resolution reciting 'that it is necessary for the peace and security of our people and the dignity of the State that our southern and western boundaries should be finally settled and defined. That this State has seen with deep regret the refusal on the part of Virginia to leave the settlement of these boundaries to friendly arbitration as proposed by this State': And then 'Resolved, that the Attorney-General of this State be and is hereby requested to cause suit to be instituted in the name of the State of Maryland against the Commonwealth of Virginia in the Supreme Court of the United States for the purpose of procuring a final legal adjustment and settlement of the southern and western boundaries.' It further provided for the employment of counsel and then resolved that 'all adversary proceedings on the part of the State against the State of Virginia *shall cease at any time before suit brought or judgment rendered, when that State shall accept the overture of Maryland made by her resolution at December Session, 1831.*'

The Answer then recites the fact of the institution of the suit in October, 1834, *"for the settlement of the western boundary of said State,"* and proceeds:

"On the 21st of March, 1835, the Legislature of Maryland passed a resolution reciting certain portions of a message of Governor Tazewell, of Virginia, *in which*

he states that the Act of Virginia, passed March 5, 1833, was intended as an acceptance of the proposition of Maryland in the amicable settlement of the question between the States, and that the determination of Maryland to seek a decision of her rights by the judicial authority of the Union, was probably occasioned by a misapprehension of the terms of that enactment by Virginia, which was susceptible of satisfactory explanation, etc. And then, repeals the resolutions of 1833 by which the said suit was directed to be brought and directs the Attorney-General to discontinue all proceedings under the same. And also authorized the Governor of Maryland to transmit a copy of said resolution to the Governor of Virginia and communicate to the Government of Virginia the earnest desire of the State of Maryland TO SETTLE AND FINALLY ADJUST THE LONG PENDING QUESTION BY AMICABLE NEGOTIATIONS."

On page 55 of the Record, the Answer of West Virginia, having mentioned the dismissal of Maryland's suit in 1836, with the matter still open for adjustment, "by amicable negotiations" as above mentioned, goes on to state:

"After this the matter appears to have RESTED WITHOUT ANY DEFINITE ACTION BEING TAKEN UNTIL THE 27TH DAY OF MARCH, 1852, WHEN THE LEGISLATURE OF MARYLAND PASSED AN ACT (ACTS 1842, CHAPTER 275)."

The Answer then sets out in full the Maryland Act of 1852 in which Maryland held herself out as ready, upon condition that Virginia would concur, to accept as the western boundary, a line "beginning at or near the Fairfax Stone on the North Branch of the Potomac River at or near its source;" it being expressly provided by Section 2 of this Act that the Commissioners to be appointed for running, locating, estab-

lishing and marking the line should make a record setting forth all the facts touching, locating and marking said line, and that the Commissioner of each State should forward a copy of the joint report to each of their respective Legislatures *"and upon the ratification of said Report by the State of Virginia and the State of Maryland through their respective Legislatures, the said boundary lines shall be fixed and established and so remain forever, unless changed by mutual consent of the two States."*

And the Answer further says that:

> "At the same session a similar act was passed by the Maryland Legislature in relation to the southern boundary of that State."

The Answer of West Virginia, continuing, further sets forth, on page 56 of the Record, the Act of Virginia of 1854, wherein the Maryland Act of 1852 was referred to and provision made for the appointment of a Commissioner to cause the said line to be accurately surveyed, traced and marked and to make a report setting forth all the facts touching the same to the respective Legislatures of the two States, and also expressly providing that:

> *"Upon the ratification of such Report by the Legislatures of the States of Virginia and Maryland, the said boundary lines shall be fixed and established to remain forever unless changed by mutual consent of the said States."*

As remarked in a former part of this Brief the Court will here observe that not only is the boundary treated as an unsettled matter still in controversy and properly the subject of mutual consideration and action by both States with a view to its ascertainment and settlement, but that such ascertainment and settlement are declared by the respective Acts of each of said States, and by language almost identical in both of said

Acts, to be absolutely conditioned "upon the ratification of such report by the Legislatures of the States of Virginia and Maryland."

That such ratification never took place and that, on the contrary, Virginia and West Virginia have persistently refused to recognize the line drawn by Lieut. Michler as the boundary in question has been repeatedly shown and is an obvious and absolute *concessum* in this case.

And in West Virginia's Cross-Bill against Maryland, wherein the matters above quoted from her Answer are for the most part repeated, West Virginia on June 1, 1893, specifically declared (Record, page 500):

> "The State of West Virginia now comes and files this her Cross-Bill, and *says that there is a controversy between her and the State of Maryland as to the true location of that boundary line between the two States which runs southward* from the point of the intersection of the meridian of the first fountain of the Potomac River with the southern line of the State of Pennsylvania, and also as to the possession of and jurisdiction and control over the Potomac River so far as it extends between the two States."

And further (Record, page 511):

> "The State of West Virginia, further complaining, says that the true northern boundary line between her and the State of Maryland is the left or northern shore of the Potomac River at low-water mark, for the whole extent of that shore coterminous between Maryland and West Virginia—that is to say, beginning on the division line between the States of Virginia and West Virginia at or near Harper's Ferry, at low-water mark on the left or northern shore of the Potomac River, and following said shore to the Fairfax stone at the head spring of said river.

"The State of Maryland claims that the said Potomac River to the right or southern shore at low-water mark is within her territory and jurisdiction, and disputes the said claim of the State of West Virgina.

"The compact made between Virginia and Maryland at Mount Vernon in 1785, mentioned in said answer, simply provided for the exercise of certain privileges and rights of navigation and fishing in said river and for the service of process upon the same, and the punishment fo crimes committed thereon, &c., BUT DID NOT SETTLE THE QUESTION AS TO WHICH STATE SAID RIVER BELONGED, NOR AS TO WHERE THE TRUE BOUNDARY LINE BETWEEN SAID STATES ALONG SAID RIVER IS LOCATED AND SAID QUESTION REMAINS UNSETTLED TILL THIS DAY."

And in this connection the attention of the Court is again respectfully called to the proceedings referred to in the Answer of Maryland to the Cross-Bill of West Virginia appearing at pages 528 to 535 of the Record, particularly the Resolutions of the Legislature of Maryland of 1832, the Act of Virginia of 1833, Resolution No. 80, of the Legislature of Maryland of March 14, 1834, and Report and Resolution No. 99 of the General Assembly of Maryland, passed March 21, 1835.

In Report and Resolution No. 99, it is said, among other things:

"The southern and western boundaries of Maryland have never been adjusted and defined, by compact with Virginia. We hold by a Charter, a charter which has been fully and solemnly recognized by the State of Virginia, but in the interpretation of that instrument, the two States have not been agreed. It is right * * * even indispensable, that the interpretation should be settled, and the limits of the States ascertained, and our sister State cannot but some time perceive that in that

settlement her voice (admitted to be equal) is not entitled to preponderating influence."

And finally we again point to the claim set up in the conclusion of West Virginia's Answer to Maryland's Bill of Complaint and repeated in her Cross-Bill against Maryland (Record, pages 74 and 76, and pages 500, 511, 517-518), as *showing indisputably* upon the claims, charges and the prayer for relief of West Virginia herself that the question of the *whole* southern, southwestern and western boundary of Maryland from the northwest corner of old Virginia all the way to the Pennsylvania line is still open and unsettled as between the two States who are parties hereto, and that the question is presented to this Court wholly unaffected by any compact, agreement or acquiescence upon the part of either of those States.

Therefore, so far as the question of the true location of the First Fountain of the North Branch of the Potomac River, now taken to be its main stream, is concerned, the Sovereign parties themselves have kept the question entirely unconcluded and open and it is presented now for adjudication by this high Court upon the merits of the claims of the contending parties, that is to say, upon the true construction of the boundaries set forth in the Maryland Charter and upon a comparison of the respective claims of the Spring at the Potomac Stone and the Spring at the Fairfax Stone, regard being had to the calls in the Charter for the western and southwestern boundaries, to be considered as the "First Fountain" of the River.

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IN THE

SUPREME COURT OF THE UNITED STATES

NO 1 ORIGINAL.

State of Maryland, Complainant,
vs.
State of West Virginia, Defendant.
} In Equity.

BRIEF ON BEHALF OF THE STATE OF WEST VIRGINIA

The bill in this case was filed by the State of Maryland on the 12th day of October, 1891, against the State of West Virginia, for the purpose of settling and establishing the true boundary line between said States. Suit was brought under the authority of an Act of the General Assembly of Maryland, passed April 8th, 1890, by which the Attorney-General of the State is authorized and directed to take, as speedily as possible, such steps as may be necessary to obtain a decision of the Supreme Court of the United States, which will settle the controversy between the States of Maryland and West Virginia over and concerning and which will finally fix and determine the true location of *that portion of the boundary line between said States lying between Garrett County, in the State of Maryland, and Preston County, in the State of West Virginia.* (See copy of said Act filed with bill as Exhibit, found on page 6 of the printed record.)

It would seem from this Act that the Legislature of Maryland did not intend to authorize its Attorney-General to undertake to do anything more than to settle the boundary line between Garrett County, Maryland, and Preston County, West Virginia. By reference to any map embracing the two States it will be seen that this line between Garrett County and Preston County is the Western-most line of Garrett County and the Eastern-most line of Preston County, and extends from the head of the North branch of the Potomac, a distance of about thirty-six miles, to the Pennsylvania

line; and our understanding is that whatever disputes there may have been in the earlier history of the two States, with reference to the claim of the State of Maryland to go to the head spring of the South Branch of the Potomac, rather than the North branch, the authorities of the State of Maryland really abandoned all such claim as long ago as 1852, if not as early as 1818, and that the only real dispute, which has been understood to exist between the two States, is that with reference to the line described in this Act of the Legislature of Maryland which directed this suit to be brought. But the honorable William Pinkney White, who was the Attorney-General of the State of Maryland in 1891, had long been one of Maryland's most prominent public men, and was aware of the ancient claim of Maryland that her boundary extended to the first fountain of the South branch of the Potomac and so when he prepared the bill in this case, he did not confine its scope to a settlement of the boundary line between Garrett County, Maryland, and Preston County, West Virginia, but set out the old claim of the State of Maryland, though in a rather indefinite way, to the South branch of the Potomac as the farthest source of the Potomac. (Page 3 of the Record.) And the prayer of the bill is that this Honorable Court, "by proper decrees and orders, will establish the true boundary line between the State of Maryland and the State of West Virginia, at a meridian line running South from the fortieth parallel of latitude to the first and most distant fountain of the Potomac, in conformity with the ancient chartered rights of this State and the laws creating the State of West Virginia and admitting it into the Union "

It became necessary, therefore, for the State of West Virginia, in her defense, to meet not only the claim of the State of Maryland as to the proper location of the boundary line between Garrett County, Maryland, and Preston County, West Virginia, but also to meet this ancient claim of the State of Maryland that her boundary extended to the head spring of the South branch of the Potomac River.

The Answer of West Virginia.

The answer of the State of West Virginia was filed on the 6th day of March, 1893, and will be found with the Exhibits filed therewith on pages 11 to 496, inclusive, and it denies, in general terms, that the State of Maryland has any right or jurisdiction over any part of the territory in the possession of the State of West Virgina, or

over which it has been exercising sovereign jurisdiction and control. It disputes specifically the ancient claim of the State of Maryland that her boundaries extended to the head springs of the South Branch of the Potomac, and claims that the true boundary line is the North branch of the Potomac to its head spring, which is at the Fairfax Stone, planted in 1746, and thence, by what is known as the Old Maryland or Francis Deakins line, to the Southern boundary of Pennsylvania.

Cross Bill.

The State of West Virginia, on the 1st day of June, 1893, also filed a cross bill, found on pages 498 to 518 inclusive, in which she asserted that the boundary line between her and Maryland is the northern bank of the North branch of the Potomac River, extending to the head of the North branch at the Fairfax Stone, and thence by the said Old Maryland or Deakins line to the Pennsylvania line, and prayed that said boundary might be established as the true boundary line between her and the State of Maryland. To this cross bill the State of Maryland, on October 30th, 1893, filed its answer, found on pages 519 to 588 inclusive.

General replications were afterwards filed by both parties and an order of survey was entered and extensive surveys made on behalf of both States, and voluminous depositions taken and filed in this cause, and, upon these pleadings and surveys and the evidence taken, the questions involved are now to be submitted to the Court for final decision.

Burden of Proof.

By this suit the State of Maryland is undertaking to disturb a status which had existed nearly one hundred and fifty years at the time this suit was brought. The territory claimed by the State of Maryland in this suit and to which she is asserting the right of sovereign authority and jurisdiction has been in the possession and under the control and jurisdiction, first, of the Colony of Virginia before the Revolution; second, by the State of Virginia until the creation of the State of West Virginia, and, third, by the State of West Virginia to the present time. The State of Maryland, therefore, assumes and must sustain the burden of proof, and, in view of the great lapse of time and the great interests, private and public, which will be disturbed if she is successful in this suit, the burden which she undertakes is, and should be, a very heavy one.

Questions Involved.

The questions involved in this case primarily arose out of the construction of the charters granted to the Colony of Virginia and to Lord Baltimore, the proprietor of Maryland, and also to Lord Fairfax and his predecessors in title to the Northern Neck of Virginia, lying between the Potomac and the Rappahannock Rivers. By reference to any current map of that part of the United States, embracing the States of Virginia, Maryland, West Virginia, Delaware and Pennsylvania it will be seen that the Potomac River empties into the Chesapeake Bay and forms the boundary line between Virginia and West Virginia, on the one side, and Maryland on the other. The main body of the river, after leaving the Alleghany Mountains, flows in a Southeasterly direction, crossing the valleys of New Creek, Patterson's Creek, the South Branch, Cacapon and the Shenandoah, from all of which valleys tributaries run into the main stream. This main stream, as far as the mouth of the Shenandoah River, at Harpers Ferry, was originally known as the Querrough or Potomack. The Shenandoah was called the Sherando, the other branch, extending Northwestward from Harpers Ferry, or the mouth of the Sherando was called the Cohungoruton. Following the Cohungoruton Westward, the stream now known as the South branch of the Potomac was called the Wappacomo, whilst that part extending from the junction of the Wappacomo with the Cohungoruton was still called the Cohungoruton as you went westward. These are the old Indian names of these streams, by which they were known to the first settlers and the earliest explorers. Subsequently the name Cohungoruton was dropped and the River was called the Potomac proper, as far westward as the mouth of the Wappocomo, and that stream was called the South branch of the Potomac, and the main stream, as we contend, continued to bear the name of the Potomac, or North branch of the Potomac, though the latter name North branch appears not to have been applied to the stream until you got past Fort Cumberland, or Cumberland, Maryland, as it now is. These were the names which were applied to the river and its several branches at the time this suit was brought; that is to say, the stream was known as the Potomac River from its mouth to beyond the City of Cumberland, Maryland. The Sherando was known as the Shenandoah, flowing into the Potomac at Harpers Ferry. The Cacapon was not changed in name. The stream formerly known as the Wappocomo was

called the South branch of the Potomac; above the City of Cumberland the name North branch of the Potomac was applied to the stream. A further examination of the map will show that the boundary line between the States of Maryland and Virginia and West Virginia, as it has always been represented on the maps, conforms to the main stream of the Potomac called the North branch above Cumberland, as above stated. On this account the territory of Maryland is very narrow about Cumberland and widens out to a point at the head of the North branch, that point being the common corner of Garrett County, Maryland, Preston, Tucker and Grant Counties of the State of West Virginia. The South branch of the Potomac runs nearly North, slightly to the Northeast. It has its source in Highland County, Virginia, and the territory between the North and South branches embraces the entire Counties of Mineral and Grant, the Eastern portions of Hampshire, Hardy and Pendleton and Western portions of Randolph and Tucker Counties of the State of West Virginia.

Questions Stated.

Under the pleadings and according to the surveys and evidence introduced on behalf of the State of Maryland, the case divides itself into several questions to be determined in the following order:

First: Whether the true boundary of the State of Maryland extends to the head spring of the North branch, as claimed by West Virginia, or to the head spring of the South branch of the Potomac, as apparently claimed by Maryland in her bill filed in this cause, and, consequently, whether the North or the South branch constitutes the true division line between the States, and whether the line running North to the Pennsylvania line shall be drawn from the first fountain of the North branch of the Potomac, or the first fountain of the South branch. It will be seen that if the South branch and its head spring is the true boundary line and corner between the States, then the State of West Virginia, as now constituted and held, will be cut into two parts, the Counties of Jefferson, Berkeley and Morgan, and the Eastern parts of Hampshire, Hardy, Grant and Pendleton being separated from the rest of the State, and a very large territory over which the State of Maryland has never exercised any jurisdiction or authority, but which, for nearly two centuries, has been under the jurisdiction and con-

trol of Virginia and West Virginia, whose inhabitants have always adhered loyally to the last named States, will be turned over to the State of Maryland.

Second: If this claim of the State of Maryland is not sustained, then she claims, as we understand it, that for the purposes of ascertaining the boundary line between the two States, the head spring of the North branch is to be found by taking the westernmost prong, which has its source about the foot of the Backbone Mountain, where there is a spring which Mr. W. McCulloh Brown, the surveyor who acted on behalf of the State of Maryland, in making the surveys in this cause, has taken upon himself to name and designate as Potomac Spring, and that the boundary line should be run from that point due North to the Pennsylvania line instead of from the point at which the Fairfax Stone stands, and which has, since it was planted in 1746, been claimed by the States of Virginia and West Virginia, as the head spring of the North branch. This spring, which Mr. Brown calls Potomac Spring, is located about one and a quarter miles west of the Fairfax Stone, and if this contention of the State of Maryland is sustained, it will take off of the Eastern side of Preston County, West Virginia, a strip of territory about one and a quarter miles in width and about thirty-six miles long and give it to the State of Maryland.

Third: If neither of the two preceding questions are resolved in favor of the State of Maryland, then the controversy resolves itself into the question as to how the line shall be run to the Pennsylvania line from the Fairfax Stone at the head of the North branch. This Fairfax Stone was planted in 1746, by Commissioners appointed by the king and council after the determination of a controversy between the Colony of Virginia and Lord Fairfax as to the boundary of his Northern Neck territory. King Charles II, in the first year of his reign, granted to Henry Lord Germine, Earl of St. Albans, Ralph Lord Hopton and others "all that tract, territory or portion of land in America, bounded by and within the heads of Tappahannock, alias Rappahannock, and Querrough, or Potomack Rivers, the courses of these rivers and Chesapeake Bay, together with the rivers themselves and all islands within the banks of said rivers." This grant subsequently became vested in Thomas Lord Fairfax and has always been known as the Fairfax Grant of the Northern Neck of Virginia. It will be seen from this description that this Fairfax grant is bounded by the Potomac

River and runs to the head of said river. The description of that portion of the lines of the grant of the Province of Maryland to Lord Baltimore, which is involved in this controversy, is as follows:

> "Going from the said Estuary called Delaware Bay in a right line in the degrees aforesaid (fortieth degree of North latitude), to the true meridian of the first source of the River Pattowmack, then tending downwards towards the South to the farther bank of the said River and following it to where it faces the Western and Southern coast as far as to a certain place called Cinquak, situate near the mouth of the same River, where it discharges itself in the forenamed Bay of Chessopeake."

This description shows that the Province of Maryland was bounded by the Potomac River, and that the head, or first source of that river, was one of the points in its boundary. The two grants, therefore, to Lord Baltimore and Lord Fairfax did not properly conflict, but were co-terminous, each calling for the head spring or first source of the Potomac River and for the river itself; the Fairfax grant including the river, and possibly the grant to Lord Baltimore also including it according to one construction of the language used. The only conflict between the two, therefore, apparently is the grant of the river. But, at present, our intention is to call the Court's attention only to the fact that both grants called for the head spring of the Potomac, as will be more fully shown hereafter. The Fairfax grant was surveyed out by commissioners appointed by the king in council for the express purpose of determining its boundaries in 1736, said commissioners taking what is known as the North branch of the Potomac as constituting that river and located its source at the point where the Fairfax Stone now stands; that stone having been afterwards planted in 1746 by other commissioners after the decision of the king in council of the controversy between Lord Fairfax and the Virginia Colony. By reference to the maps in this case, it will be seen that this stone is planted at the head of the middle prong of the North branch of the Potomac. From this Fairfax Stone a line or lines were run at a very early day North to the Pennsylvania line. It would seem that such a line had been run prior to 1789 from certain facts which will be more particularly pointed out later. But in that year, under the authority of the General Assembly of the

State of Maryland, Francis Deakins, in laying out military bounty lots for the Revolutionary soldiers of Maryland, ran a line from the Fairfax Stone North to the Pennsylvania line. This Old Maryland or Deakins line is the line to which Virginia or West Virginia has always claimed and has exercised jurisdiction and governmental authority. In 1859, Lieutenant Michler of the United States Coast Survey, acting under commissioners appointed by the States of Virginia and Maryland, undertook to retrace this line from the Fairfax Stone to the Pennsylvania line, and he discovered or reported that the Old Maryland or Deakins line did not conform to a due North course, but departed from the due North course toward the East, so that it struck the Pennsylvania line about three-quarters of a mile East of the point where a due North line, drawn from the Fairfax Stone to the Pennsylvania line, would strike it, and Lieutenant Michler ran, by careful scientific astronomical observations, a due North line in 1859 from the Fairfax Stone, striking the Pennsylvania line, as we have stated, about three-quarters of a mile west of where the old line struck it, making a triangular piece of land between what is known as the old Maryland or Deakins line and the Michler line three-quarters of a mile wide at the Pennsylvania line and running to a point at the Fairfax Stone. Now, as we understand it in this case, the State of Maryland, if she shall be unable to maintain her claims to go to the head spring of the South branch of the Potomac, or failing in that, to go to the point called by Mr. Brown as the Potomac Spring, claims that she has the right to have the Michler line established as the true line between the States rather than the Old Maryland or Deakins line running from the Fairfax Stone; the State of West Virginia claiming that the old Maryland or Deakins line to which she has always claimed and held shall continue to be recognized and respected as the true boundary line betwen the States.

Fourth: The question as to which of the States has rightful jurisdiction over the Potomac River is also presented in this cause for decision by the cross bill of the State of West Virginia and the answer thereto of the State of Maryland. As has been stated above, apparently the Potomac River with the islands therein, is included within both the Maryland grant to Lord Baltimore and the Northern Neck of Virginia grant to Lord Fairfax, or his

predecessors, and the Court is asked to settle in this case which has the superior title to the jurisdiction over this river.

Is the North or the South Branch of the Potomac the Boundary Line Between Maryland and West Virginia?

As stated above, the first question to be determined in this cause is which of the two branches of the Potomac, the North or the South branch, shall be recognized and established as the boundary line between the States. In order to determine this question correctly, it is necessary to examine the ancient charters of Virginia and Maryland and certain historical facts connected with the two Colonies. These acts are very fully set forth in the answer of the State of West Virginia filed in this cause, found on pages 12 to 64 inclusive of the Record. They are now copied into this brief for convenience, with slight modifications.

Early History and Boundaries of the Virginia Colony.

The southern part of the North American continent was first discovered by the Spaniards as early as 1512, and they called it Florida. In 1584 the English made discoveries farther northward, and Queen Elizabeth, who then occupied the throne gave the name of Virginia to the country. This name was applied to all the country which was claimed by the English and was recognized to extend all along the coast and inland as far as the country extended. The only attempt at settlement of the new land in the reign of Elizabeth was that made by Sir Walter Raleigh, in North Carolina, in 1584. After the unfortunate result of this enterprise, no further settlements were attempted until the reign of James I, who succeeded Elizabeth in 1603.

First Virginia Charter.

The first Virginia charter was issued by King James I, and was dated the 10th day of April, 1606. By his letters patent of that date he divided that portion of Virginia lying between the 34° and 45° of north latitude into two parts, and he authorized Sir Thomas Gates and his associates under the name of the London company, to plant a colony wherever they might choose between 34° and 41° north latitude and vested in them the right of property in the land extending along the sea coast fifty statute miles on each side of their first plantation and reaching into the interior one hundred

statute miles from the sea coast. This territory he called the First or Southern Colony of Virginia.

The other part he called the Second or Northern Colony of Virginia, and this he granted to Thomas Hanham and his associates under the name of the Plymouth Company.

He authorized this company to plant a colony wherever they might choose between 38° and 45° north latitude and gave them a territory of similar limits and extent to that given to the first colony. He provided, however, that whichever plantation
33 of the two colonies should be last made should not be within 100 miles of the other that might be first established. These colonies were at first called the London and Plymouth Colonies, but their names were soon changed and the name Virginia which had been at first applied to both was retained only by the Southern colony while the Northern colony became known as New England. See charters and constitutions of the United States, Part 2, page 1888. (Record, page 1243.)

First Settlement of Virginia..

The London company began its settlement first. The first settlement by that company was made on the 13th day of May, 1607, at a place called by them James City on the James river in what is now Virginia. The leading spirit among these first settlers was the celebrated Captain John Smith. See Smith's History of Virginia, vol. 1, book 3, chap. 1, p. 149.

The first charter of April 1, 1606, itself enables us to determine with great accuracy the limits of the grant made by it to the London company. If a meridianal line be drawn through James city and extended each way the distance of fifty statute miles from it; if parallels be drawn through the extremities of this meridian and extended to the sea coast; if 100 statute miles from them be laid off upon each of these parallels, and if a straight line be drawn from the extremity of one of them so determined to the extremity of the other, the diagram so to be constructed may be considered as a parallelogram or square, the base of which will be 100 square miles and its area 10,000 square miles. Such a diagram so constructed is in precise accordance with all the calls of this charter.

This charter was granted before the country to which it was designed to apply was discovered, and the territory could not reason-

ably be confined to such limits owing to its many disconnected peninsulas. This was soon discovered by the exploration of Captain John Smith in the year 1608. (See Smith's History of Virginia, vol. 1, book 3, chps. 5 and 6 and the map.) Accordingly the London company applied to the King to alter this charter and on the 22nd of May 1609 he issued new letters patent of that date for that purpose.

The Plymouth company had then made no settlement, so that the country granted was as open to the new grant as it had been in 1606.

Before this new charter was granted to the London company the northern headlands at the mouth of James river was discovered and called by the name it still bears—Point Comfort.

34 *Second Charter of Virginia.*

Taking this known and established position as a starting point the new charter granted to the London company "all those lands &c., situate, lying and being in that part of America called Virginia from the point of land called Cape or Point Comfort, all along the sea coast to the northward 200 miles; and from the said Point or Cape Comfort all along the sea coast, to the southward 200 miles, and all that space or circuit of land lying from the sea coast of the precinct aforesaid up into the land throughout from sea to sea west and northwest; and also all the islands lying within 100 miles along the coast of both seas of the precincts aforesaid." (See Smith's History of Virginia, appendix no. 2, p. 8, etc., also Charters and Constitutions U. S., part 2, page 1893). (Record, page 1246.)

As one of the purposes of this second charter is declared in it to be "to grant a further enlargement and explanation of the former grant of 1606," and as no other change in the mode, of determining the new and enlarged limits from that required for determining the boundaries under the first charter, except that the precise point of Cape Comfort is substituted for James City, we are bound to adopt the same mode of determining the new limits which had been above suggested in the former case. Therefore if a meridianal line be drawn through the point of Cape Comfort, and extended each way to the distance of 200 miles from thence; if parallels be drawn through the extremities of this meridian and extended from sea to sea (*i. e.* from the Atlantic to the South sea or Pa[illegible]),

the diagram so constructed may be consid-ed a parallelogram, the base of which will be the sea coast of the Atlantic, having a meridinal length of four hundred miles, bi-sected by the parallel of the point of Cape Comfort, and the altitude of this parallelogram will be the distance from sea to sea.

The reasons why the limits of the London Company was extended precisely 200 miles to the north of the parallel of the point of Cape Comfort may be found by calculating the difference of latitude between that parallel and the more northern parallel of 40° In making this calculation allowance must be made for the trifling error caused by the imperfection of the clumsy instruments used in 1609, for making observations of latitute, as also for the erroneous opinion then entertained as to the length of a degree of a great circle in English statute miles. The exact quantity of each of these errors is now known. And correcting the calculation in this way, it will be discovered that 200 hundred English statute miles, measured along a meridian from the parallel of the point of Cape Comfort will reach to the parallel of 40° North latitude, which parallel was then made the common boundary between the two great districts of Virginia and New England, (For the facts in the foregoing statement see Report No. 457, 28th congress 1st session H. Reps. "Issue of "scrip," etc., to accompany bill H. Reps. No. 353, made by Hon. H. E. Hubard, from Committee on Public Lands, partly written by L. W. Tazewell, Esq., and partly by Benjamin Watkins Leigh, Esq., of Va., and partly by Mr. Hubard—see his letter to Hon. H. A. Wise, dated September 6, 1872, a copy of which is found on pages 1 to 4 of the appendix to the report and accompanying documents of the Va. Comms' on Maryland and Virginia boundary line of 1873, (Record, page191,) which last named report and documents is filed herewith as part of this answer marked Defendant Exhibit A. (Record pages 192 to 245.)

35

Third Charter.

A third charter was granted by King James I, to the London Company March 12, 1612, by which he granted to said company "all and singular those islands whatsoever situate lying and being in any part of the ocean seas bordering upon the coast of our said first colony in Virginia and being within 300 leagues of any of the parts heretofore granted to the Freeman and Company, in our

former letters patent as aforesaid and being within the 41° and 30° of northerly latitude," etc. Charters and Constitutions part 2 page 1902. (Record page 1249.)

Cancellation of Virginia Charters.

All these three charters of the London Company were cancelled by a judgment of the Court of Kings Bench at the Trinity term in the year 1624 in *quo warranto* proceeding. But this cancellation of the charters of the company simply had the effect to take away the monopoly of the said company and its power of government over the colony. It did not affect the territorial limit of or other rights of the colony. It simply transferred the government of the colony from the London company to the King, and the royal government thus established recognized and extended over the same territory and colony, as the company had held. Virginia was after that the Southern Colony of Virginia, just as it had been before, and the right of her citizens and the extent of her territory were to be determined by the provisions of those charters as well after said judgment in the *quo warranto* case against the company as before.

The colonial legislature opposed the restoration of the
36 charters to the company in 1642 (see Henning's statutes at large pp. 230, 236). In 1671 a series of inquiries was addressed to Governor William Berkley, of Virginia, by the Commissioners of Foreign Plantations, among them the following: "What are the bounds and contents of the land within your government?" And Governor Berkley sets out the bounds of Virginia in reply to the inquiry. The charters therefore were not annihilated but were recognized. So far as lands had been granted under the charters the title remained in the grantees; so far as the lands in the territory were vacant they became revested in the crown and were from that time crown lands in the King's dominion of Virginia. The extent of that dominion was to be ascertained only by the territorial limits described in the charters. Those vacant lands could only be obtained by grants from the crown, and these grants were made according to a system of land laws enacted by the colonial legislature and through the instrumentality of the colonial government.

Charter of North Carolina.

The colony of Virginia therefore extended from the 40° north

latitude, which lies 16 miles north of the present southern boundary of Pennslyvania, to the 34° north latitude, which is near the most southern point of North Carolina. In 1662, King Charles II, granted Carolina to the Earl of Clarendon and others, which extended northward as far as 36° 30′ and this has been ever since the southern boundary of Virginia.

Maryland Charter.

James I, died in 1624, and was succeeded by Charles I, who was a friend of Lord George Baltimore. King James I, had granted Lord Baltimore certain territory at Newfoundland, [illegible] he had founded a colony there, but becoming dissatisfied with the colony on account of the rigor of the climate he visited James City in Virginia in 1629, and being unable to take the oaths of supremacy and oaths of allegiance that were tendered by the authorities of Virginia, he petitioned the King to make him a grant of certain unsettled parts of Virginia. Before the charter was granted Lord George Baltimore died and was succeeded by Cecilus Calvert, Baron of Baltimore in Ireland, etc.; and in 1632, Charles I, issued the charter of Maryland to said Calvert, a copy of which in latin is filed with the bill of complaint of the State of Maryland in this case. And see Charters and Constitutions, U. C., part 1, page 810.

37 There is some doubt as to the correct reading of the original charter, and there is also some question as to what is the correct translation of it. The State of West Virginia submits the following as the best authenticated copy of the original charter of Maryland and also what is believed to be a true translation of it in parallel columns. This is an exact copy of a document obtained by Col. De Jarnette, who was sent by the State of Virginia to England in 1871, to procure documentary evidence relating to the disputed boundary lines between that State and the State of Maryland. Col. De Jarnette in his report to the Governor of Virginia made November 8, 1871, says of this paper:

"Chapter 20th. Patent to Cecil (Lord Baltimore) containing a grant of province of Maryland, communicated to Mr. Beak from Lord Baltimore dated June 20, 1632. This purports to be the original, found in the Rolls office, enrolled on parchment and engrossed in the Latin language. This copy was taken by the Keeper of the Rolls and bears his official seal. To verify this (a most important

paper) I employed Thomas Edlyne Tomlius (attorney-at-law and Record Solicitor of Lincolns Inn Fields, London,) to copy and translate so much of this Latin Charter, found in the Rolls-Office, as describes the bounds of the territory thereby granted."

Translation — Extract Patent Roll 8, Charles I, Part 3, No. 5, (20 June, 1632).

Of a grant to him and his heirs, to Cecil, Baron of Baltimore, the King, &c., to all to whom, &c., Greeting:

Know ye, therefore, that we, regarding with Royal favor the pious and noble purpose and intention of the aforesaid Barons of Baltimore, of our special grace, certain knowledge and mere motion, have given, granted and confirmed, and by this our present charter for us, our heirs and successors, do give grant and confirm to the aforesaid Cecil, now Baron of Baltimore, and his heirs and assigns, all that part of the Peninsula or Chersonese lying in the parts of America between the Ocean on the East and the Bay of Chessopeake on the West, divided from the remnant of the same by a right line drawn from the Promontory or head of Land called Watkin's

Transcript of the original Inrollment in Latin with the abbreviations extended.

De concessione sibi et haredibus Cecilli Baroni de Baltimore, Rex & Omnibus ad quos, &c.

Sciatis igitur quod nos pium et nobile prefatorum Baronum de Baltimore, propositum et studium regio favore prosequentes, ex gratiae specili, certa scientia et mero motu nostris. Dedimus, concessimus et confirmavivus et per hanc presentam chartam nostram pro nobis heredibus et succesoribus, nostris prefato Cecilli, modo Baroni de Baltimore et heredibus et assignatis suis Damus concedimus et confirmavivus Totam illiam partam (sic) Peninsule, sive Chersonesus jacentem in partibus Americe inter Occanum ex oriente et Sinum de Chesopeake ab occidente, a residuo ejusdem per rectam lineam a promontorio sive Capite terre vocato Watkins Point juxta sinum predictum,

Point, beside the Bay aforesaid, situate near the river Wigheo, on the West, as far as the Great Ocean on the Eastern Coast, and between that boundary on the South as far as to that part of the Estuary of the Delaware on the North, which lieth under the fortieth degree of North latitude

prope Fluvium de Wigheo situatum, ab occidente, usque ad magnum Oceanum in plaga orientali ductam divisam, et inter metam illam a meride usque at partam illam estuarii de De La Ware ab Aquilone que subjacet quadrigesimo gradui latitudinis Septentrionalis ab equinoctiali

from the Equator where New England is bounded; and all that tract of land within the boundaries underwritten, that is to say: Going from the said Estuary, called Delaware Bay, in a right line in the degree aforesaid to the true meridian of the first source of the River of Pattowmack, then tending downwards towards the South to the farther bank of the said River, and following it to where it faces the Western and Southern Coast as far as to a certain place called Cinquak, situate near the mouth of the same River, where it discharges itself into the forenamed Bay of Chessopeake, and from thence by the shortest line, as far as the aforesaid Promontory or place called Watkin's Point. So as all the tract of land divided by the line aforesaid between the Great Ocean and Watkin's Point, as far as to the Promontory called Cape Charles, and singular their appendages, to us, our heirs and successors are entirely remaining forever excepted. And also all Islands and Isles within the limits aforesaid. We do also grant and do confirm to the same Baron of Baltimore, his heirs and assigns, all and singular Islands and Isles on the Eastern Shore of the aforesaid country towards the east risen or to arise in the sea situate within

ubi terminatur Nova Anglia, Totum que illum terre tractum infra metas subscriptas, videlict transeundo a dicto Estuario vocato Delaware Baye recta linea per gradum predictum usque ad verum meridianum primi fontis fluminis de Pattowmack deinde vergendo versus meridiem ad ulteriorem dicti fluminis ripam et eam sequendo qua plaga occidentalis et meridionalis spectat usque ad locum quendam appelatum Cinquack prope ejusdem Fluminis ostium scituatum ubi in prefatum Sinum de Chessopeak evolvitur ac inde per lincam brevissimam usque ad predictum Promontorium sive locum vocatum Watkin's Point. Ita quod totus terre tractus per lineam predictam inter magnum Oceanum et Watkin's Point divisus usque at promontorium vocatum Cape Charles et singula sua appendentia nobis heredibus et successoribus nostris integre remanentia exceptis imperpetuum, nec non omnes Insulas et Insululas infra limites predictos. Concedimus eciam et confirmavivus eidem Baroni de Baltimore heredibus et assignatis suis omnes et singulas Insulas et Insululas ab orientali predicte Regionis littore orientem versus, in mari natus vel nascendas infra decem lineas marinas ab eodem littore scituatus (sic cum omnibus et

ten sea leagues from the same shore, with all and singular ports, roads of shipping, estuaries, flowings of water and arms

singulis portubus, navium stacionibus estuariis, fluminibus et fretis ad regionem vel Insulas predictas pertinentes.

of the sea to the Country or Islands aforesaid belonging.

A true translation.

THOS. EDLYNE TOMLINS
Attorney-at-Law and
Record Solicitor,

No. 25, Lincolns Inns Fields,
London, June 5, 1871.

A faithful transcript.

THOS. EDLYNE TOMLINS,
Attorney-at-Law and
Record Solicitor.

No. 25 Lincolns Inns Fields,
London, 5th June, 1871.

See House Documents of Maryland, 1874, pages 219 and 220.

It will be observed that the northern limits of Maryland, as described in the charter was the 40° *north latitude where New England is bounded* or terminates, and that it extends *from the Delaware Bay* with the 40° to the *meridian* of the *first fountain* of the Potomac.

It is proper to state here that the Plymouth Company, or Northern Virginia Colony, had made no settlement up to 1620 and in that year a new and enlarged charter had been granted to the Duke of Lenox and others who were denominated the Plymouth Company, conveying to them in absolute property all the lands between the 40° and 48° north latitude. This Company in 1627 conveyed to Henry Rosewell and others that territory which is now Massachusetts, and in 1635 the Plymouth Company surrendered its charter to the Crown. (See Marshall C. J., opinion in Johnson and Grahams Lesees *vs.* William McIntosh, 8 Wheaton.)

In 1632 therefore the southern boundary of the Plymouth Company's territory, or of New England, as it was called, was the 40° north latitude, and it was to this line that Lord Baltimore's charter extended northward.

The territory described in the Maryland charter also extended to the Ocean and the *Delaware Bay* on the east.

Western Boundary of Maryland.

The western boundary was to be ascertained by following the 40° "to the true meridian of the first source of the River Potomack then tending downward toward the south to the further bank of the said river, and following it to where it faces the western and southern coast as far as to a certain place called Cinquack situate near the mouth of the same river where it discharges itself into the forenamed bay of Chesapeake."

It will be observed that the whole of the territory described in the charter to Lord Baltimore was included within the limits of the Virginia charter of 1609. The Virginia colony strenuously opposed the granting of this charter to Baltimore, and tried to have it revoked after it was issued, claiming that the territory belonged to Virginia, and that it was an unwarranted and unlawful dismemberment of her domain. The King referred the matter to his Privy Council and the controversy was heard by the Council, and on the 3rd of July, 1633, they decided "to leave Lord Baltimore to his patent, and the other parties to the course of the law, according to their desire." (Chalmers' annals ch. 9, note 18.)

Grant of Northern Neck of Virginia in 1649-50-51.

On 28th July, 1639, a petition by the governor and company of London for the plantation of the Somer Isles—now Bermuda Isles —see map of 1763 (see No. 56, State Papers, Colonial Vol. 10, No. 30) addressed to the Lord Commissioner of foreign plantations shows that said company was incorporated about the year 1621, and the inhabitants were not able to subsist there and sought another place. That an agreement had been made between the company of Virginia and the petitioners when the latter purchased the Somer Isles from the former, that the petitioners should receive a large proportion of land in Virginia, and they prayed for a grant of land situate and being betwixt the two rivers of Rappahannock and Potomack. This petition shows that the northern neck as it is now called, was not then inhabited by English subjects, and that no grant thereof had yet "passed to any." This with the enclosed papers was submitted to the Lord Commissioners on the 1st day of August 1639. Then August 3, 1663 came a letter from Charles II, to the Governor and council of Virginia, reciting that he had granted to Henry, Lord Germine now Earl of St. Albans, Ralph Lord Hopton and others in the First year of his reign by letters patent under the great seal of England (since enrolled in the Court of Chancery) "all that tract, territory or portion of land in America bounded by and within the heads of Tappahannock alias Rappahannock and Querrough or Potomack rivers, the courses of these rivers and Chesapeake Bay, together with the rivers themselves, and all islands within the banks of the said rivers, as in and by said letters patent doth and may more at large appear, which by reason

of the late unhappy and unsettled times they could not plant or enjoy according to our royal intention." And it recites that
41 the said Earl of St. Albans, Ld Berkley, Sir William Morton and our servant, John Fetleroy, assignee of said Lord Hopton (being the surviving patentees and parties interested) had lately, since the restoration of said Charles II. to his rights and government granted and demised to Sir Humphrey Hooke, Knt., and others the said tract and territory for a certain number of years. And also reciting that he had by his letters under his sign manual signified to the Governor and Council of Virginia that they should give these patentees aid and assistance, and that he had reasons to believe his said letters had miscarried and had not come to their hand, for that they had lately obstructed the proceedings upon his said letters patents and had not permitted the patentees, &c., to act in pursuance or according to the tenor thereof. And then directs that the Governor and Council shall forbear to give any further interruption but that they aid and assist the patentees, &c., and concludes as follows: "Neither we intending nor our said patentees desiring to withdraw the said Colony from under your government or appeal."

See the De Jarnette State Papers, No. 80, Colonial Virginia, Vol. 59, No. 19, Aug. 3, 1663; see page 155 of the report, &c., of the Virginia commissioners on the boundary line between Maryland and Virginia 1873, Exhibit "A" above

Confirmatory Grant of Northern Neck in 1668-9.

And in the Public Record Office of England, Chancery Patent Roll 21 Car. 11 dated May 3, 1667, came the patent or grant from Charles II confirming Letters Patent under the great seal of England bearing date at St. Germines the 18th day of September in the first year of our reign unto Ralph Lord Hopton, Henry, Earl of St. Albans, etc., etc., their heirs and assigns for ever, all that entire tract, territory or parcel of land situate lying and being in America, and bounded by and within the *heads* of the rivers Tappahannock alias Rappanhannock and Quiriough or Pattowmack river, *the courses of the said rivers*, as they are commonly called and known by the inhabitants and description of those parts and Chesapeake Bay, *together with the rivers themselves*, and all the islands within the banks of those rivers. And all woods, etc."

This patent recites the terms of the grant to Lord Hopton made in the first year of the reign of Charles II which was 1651 and then recites that "whereas the said Ralph, Lord Hopton, John, Lord Culpeper, Sir Dudley Wyatt, and Thomas Culpeper being all since dead, and the said Ralph, Lord Hopton having in his
42 life time, by good and sufficient conveyance and assurance in law, convied and assured all his estate and interest in said premises unto John Tretheny, Esq., and his heirs all the said premises, tract, territory and portion of land, "etc," and whereas the said Henry, Earl of St. Albans, etc., by their deeds, etc., bearing date the nine and twentieth day of June now last past, etc., have granted and surrendered to us the said tract, etc., with the aforesaid letters patent to be cancelled to the intent that we would be graciously pleased to grant them new letters patent thereof, etc., etc. Now know ye, that we for, etc., have granted and confirmed, etc., unto the said Earl of St. Albans, John Lord Berkley, Sir William Morton, John Tretheny, their heirs, etc., all that certain tract, territory or parcel of land situate, lying and being in America and bounded by and within the heads of the river Tappahannock alias Rappahannock, and Quiriough alias Potowmack, river, courses of said rivers together with all the rivers themselves and all the islands within the banks of those rivers, etc." And after full and complete proprietary rights and powers are granted, and a covenant to supply all further defects it proceeds: "Provided always, etc., that these presents or anything therein, etc., shall not extend or be construed to extend to infringing, make void or otherwise prejudice any contract or grant, etc., whatever heretofore made or granted by the Governor and Council of Virginia of the premises etc., etc., made before the 29th day of September in the 13th year of our reign." And these grantees were prohibited from acting or intermeddling in the military affairs or forces in the territory "or with the government or command of any of the castles, forts, etc., thereof without the order, authority and command of the Governor and Council of Virginia, for the time being, but the same shall remain, continue and be in the Governor and Council of Virginia, etc., etc. And the Governor and Council and Assembly of Virginia for the time being shall have full power and authority to lay any taxes and impositions in and upon the said territory hereby granted." And these grantees and the inhabitants in the territory were

"in all things made subject and obedient to such laws and constitutions as are or shall be made by the said Governor, Council and Assembly for or concerning the said Colony or the Governor thereof."

This confirmatory grant was dated May 8 in the 21st year of the reign of Charles II. He never counted the years of the Commonwealth or of Cromwell. Charles I was executed in 1649, and was succeeded according to the claims of the royal family by Charles II in the same year and it was in that year while he was in exile that Charles II made the first grant above named to the Earl of
43 St. Albans, Lord Hopton and others. And according to the same count this confirmatory grant was in 1668-9.

Confirmatory Grant of Northern Neck to Lord Culpepper.

A third patent was issued by James II in the 4th year of his reign which after reciting a sale and conveyance of the granted premises by the former patentees to Thomas Lord Culpepper "who thereby became sole owner and proprietor thereof" proceeds to confirm the same to Lord Culpeper, in fee simple and to release him from the condition of having the lands inhabited and planted in the space of twenty-one years as had been provided in the former patent.

Lord Fairfax Succeeds Lord Culpepper.

Upon the death of Lord Culpeper, Thomas, Lord Fairfax became his heir at law and as such became the sole proprietor of the said territory with the appurtenances and the above recited letters patent.

The Fairfax Title.

Thomas, Lord Fairfax died in 1781 and by his last will and testament duly made and published devised the whole of his lands, etc., called or known by the name of the Northern Neck of Virginia, in fee to Denny Martin, etc., upon condition of his taking the name and arms of Fairfax, etc., which condition was fully complied with.

See full statement of this title in the case of Fairfax's devisees *vs.* Hunter's Lessees, 7 Cranch. 604.

Also in Marshall *vs.* Conrad, 5 Call. (Va.) 404.

Also in an act of the General Assembly of Virginia passed in 1736, entitled "an act for confirming and better securing the titles

to lands in the northern neck held under the right honorable Thomas Lord Fairfax, Baron of Cameron, etc.

1 Revised Code, 1819, ch. 89. (Record p. 1252.)

This last act recites the three several letters patent above set out, and that Thomas, Lord Fairfax "is now become sole proprietor of the said territory with the appurtenances and the above recited letters patent" and that "divers great quantities of land have been granted to adventurers and planters within the said territory in fee simple, by the agents and attorneys of the said Lord Fairfax and his predecessors, former proprietors of the said territory and let-
44 ters patent by virtue of divers letters of attorneys from time to time by them respectively given to their said attorneys and agents, but now of late, after long possession and great and valuable improvements made upon said lands by said grantees, questions are like to arise between them and the present proprietor touching the validity of such grants, etc., and then confirms all such grants made by any of the agents and attorneys of the proprietors of said territory or any of them, and declares that they shall be good, available and binding in law, etc.

Fairfax's Devisees Settle With Virginia.

By an act of the General Assembly of Virginia, passed Dec. 10, 1796, (1 Rev. Code of Va. ch. 92, Record page 1267) the Devisees of Lord Fairfax relinquished to the commonwealth of Virginia all claim to lands supposed to be within the Northern Neck, which were waste and unappropriated at the time of the death of Lord Fairfax, and Virginia confirmed the title of those claiming under Mr. Fairfax to lands specifically appropriated and reserved by the late Thomas Lord Fairfax or his ancestors for his or their use.

It will be seen from the foregoing recital that the title to the territory included in the charters granted by Charles II, and James II to the Earl of St. Albans, Lord Hopton and others, continued in those patentees and their grantees and those claiming under them down to the revolution and that after the revolution in 1796 all of the territory that then remained waste and unappropriated and which had not been specifically appropriated by the former proprietors became vested in the commonwealth of Virginia. These lands so relinquished to Virginia became subject to entry, survey

and grant through the land office of Virginia in the same manner that all her other waste and unappropriated lands were, and they were afterwards all granted by Virginia in this way. See ch. 91, 1 Rev. Code of Va. Acts 1785 ch. 47 erroneously numbered 67. (Record p. 1266.) In the case of Fairfax's devisees *vs.* Hunter's Lessees. 7 Cranch 604, this court held that "Lord Fairfax, at the time of his death, had the *absolute property, seisin and possession* of the waste and appropriated lands in the Northern Neck of Virginia."

Jurisdiction of Virginia and West Virginia Over the Fairfax Grant.

The territory embraced in this Northern Neck tract had belonged to and been under the jurisdiction and dominion of the
45 Colony of Virginia from the time her first charter was granted in 1606. The patents for that territory granted by Charles II. and James II. to Lord Hopton and others expressly left it under the governmental jurisdiction and control of the Colony of Virginia, and it has continued under the exclusive sovereign jurisdiction and control of Virginia and of the State of West Virginia, so far as it lies within the limits of the latter, from the Revolution to the present time.

This court and the Supreme Court of Appeals of Virginia have decided that *Lord Fairfax* and those under whom he claimed and those claiming under him had not only the absolute fee simple title to the soil of the territory *but also the seisin and possession of the same.* This absolute title and seisin and possession have continued undisturbed to the present day, and the governmental jurisdiction and control over said territory has been exercised exclusively first by the Colony and then by the Commonwealth of Virginia, and since June 20, 1863, by the State of West Virginia so far as this territory lies within her limits.

Boundaries of Northern Neck.

Now, What are the boundaries of the Northern Neck of Virginia? What is its location? The boundaries and location of this territory have been definitely established, marked and determined, by the only authority having the power and jurisdiction to establish, mark and determine them, for nearly a century and a-half and during all that time they have been recognized and respected and have not been interfered with, as will fully appear from the following historical statement of facts.

Survey of the Northern Neck—1736.

On November 29, 1733, the King, in council, made an order which recites that Thomas, Lord Fairfax, had presented his petition setting out his patents from Charles II. and James II. and describing his title and territory thereby granted (as above set out) and that several disputes have arisen between his Majesty's Governor and Council of Virginia and the petitioner and his agents touching the boundaries thereof, and that said Governor and council have from time to time actually taken upon them to issue grants of divers parcels of land, parts of petitioners' said tract, etc., and that he is advised that they were clearly within the bounds of his said tract, and that said Fairfax prays that in order to settle the boundaries of the petitioners' said tract
46 or district his Majesty would be graciously pleased to order a commission to issue for running out, marking and ascertaining the bounds of petitioners' said tract or district of land agreeable to the description thereof as expressed and contained in the said several grants from the crown, and to name such number of commissioners for Virginia as his Majesty should think proper to be joined with an equal number on petitioners' behalf, to run, settle, and ascertain said boundaries, etc., and that the Governor and Council of Virginia ought to be directed and prohibited from making grants, etc., until said boundaries, etc., were settled: And thereupon his Majesty orders that the Lieut. Governor of Virginia shall nominate three or more commissioners (not exceeding five) who in conjunction with a like number to be named etc., by Lord Fairfax are to survey and settle the marks and boundaries of the said district of land agreeably to the terms of the patents under which the said Lord Fairfax claims, within the space of two years after the arrival of this order, and in the meantime the Lieut.-Governor is ordered not to presume to make any grants within the above mentioned tract.

Lord Fairfax brought over this order himself, but did not present it to the governor until more than two years from its date. See Byrd Manuscripts. Proceedings of the Commissioners to lay out the bounds of the Northern Neck. (Record page 1208 et seq.)

Commisioners Appointed.

William Gooch, the Governor of Virginia, on the 7th day of

September, 1736, the 10th year of the reign of George II, Commissioned William Byrd, John Robinson and John Grimes, as commissioners to act for the Colony of Virginia in this matter.

Instructions to Commissioners.

In the instructions to these commissioners, dated September 8, 1736, is the following:

"For as much as it may be necessary for the more clear description of the bounds in the controversy to have exact maps of the Rivers Rappahannock and Potomack and the branches thereof to the first heads or springs so called or known, you are to cause the surveyors so by you employed to prepare correct maps thereof in order to be laid before his Majesty." And they were also instructed "to take depositions and affidavits of such persons as you shall see proper to examine touching said Rivers Rappahannock and Potomack, and how far they were known by these names at the time of the last grant made by King James II, to Lord
47 Culpeper, and how far the bounds of the territory aforesaid were reported to extend, or have been since bounded by the proprietors thereof or their agents, etc., etc."

See Byrd's Manuscript, etc. (Record page 1214.)

Lord Fairfax appointed Charles Carter, William Beverly and William Fairfax, as his Commissioners, and instructed them "to make full, true and exact report of all matters of fact and all their proceedings specially in order to be laid before his Majesty for his final determination, etc., etc., also to mark and settle the boundaries aforesaid after such determination of his Majesty with such commissioners as shall be nominated by his Majesty."

The King's Commissioners and two of Fairfax's Commissioners met at Fredericksburg, September 25, 1736. A question arose as to the powers of the Commissioners, Fairfax's claimed that they were only empowered to survey the controverted bounds so that a state of facts might be afterwards laid before the King for his Royal determination. And this was finally acceded to by the King's Commissioners.

Instruction to Surveyors.

The King's commissioners appointed Mr. Mayo and Mr. Brooks as surveyors who in conjunction with Mr. Winslow and Mr. Savage

appointed on the part of Lord Fairfax were instructed among other things "to run the courses and measure the distance of the Branch of the Potomack called Cohaungoruton from its confluence with Sharando to the head spring thereof," with orders to return an exact map of said river showing all the streams that run into the same on either side. They were also directed to *take the latitude and observe particularly where the said river intersected the 40th degree.*

The Survey of the Potomack River.

This survey was begun in the fall of 1736 and was not completed until the summer of 1737. The Potomack above its confluence with the Shenandoah, then called the Sharando, was known as the Cohungoruton, and it bore this name to the head of the North branch, the South Branch being known as the Wappacomo.

North Branch Adopted as Main Potomack River.

When the surveyors arrived at the mouth of the South Branch of the Potomack they halted and took observations and
48 made careful measurement of the width, depth and volume of water of the two streams, the general course of these streams and of the topography of the country, and after carefully considering the matter they decided that the Northern Branch was the main river, and accordingly they proceeded up it, and traced and surveyed the course to its head springs in the Alleghany mountains. The Rappahannock had been surveyed by another party, and the line between the head springs of these two rivers was afterwards run and ascertained.

Report and Maps of the Survey.

After the surveys were made Fairfax's Commissioners refused to co-operate with those of the King in making up their report and maps. Finally the King's Commissioners determined to make a report without them and ordered Mayo to make a general map out of the several particular maps that had been made. And William Byrd in his accounts of these matters contained in his manuscript above mentioned, states that "Major Mayo formed an elegant map of the whole Northern Neck by joining all the patricular surveys together, etc. That the Potomack River was therein likewise traced with great exactness from the mouth up to the fork, a little beyond

the Blue Ridge of Mountains and from thence up the North Branch called Cohungoruton—quite away to the head springs thereof with all the waters that discharge themselves into it. And the distance Cohungoruton runs from its confluence with Sharando is according to the meanders thereof 206 miles to the Foundation thereof. From the hills out of which this river rises may be seen other waters which run westward and may be the spring of one of the branches of the Mississippi, probably that commonly called Alleghany. In the map the courses of Sharando are not described, but just where it parts with Cohungoruton, by reason such description could give no light to the controversy betwixt his Majesty and Lord Fairfax."

The report and maps of the King's Commissioners were made in duplicate and delivered to the governor in August, 1737, in order to be transmitted, and Lord Fairfax soon after sailed for England, taking the report of his commissioners with him, etc.

See Byrd's Manuscripts for a full account of this proceeding, etc.

A copy of the map made at this time is filed with the answer of West Virginia marked, "Survey of Northern Neck, 1736-7." Defendant's Exhibit B. This is a litho-photographic copy made in London for either McDonald or De Jarnette sent there by Virginia, to be used in her controversy with Maryland. (Record p. 362.)

Report of Lords Commissioners of Trade and Plantations.

49 After the report of the commissioners was filed Lord Fairfax January 12, 1738, obtained a reference to the Lords of Trade (and Plantations) for them to examine the whole matter and report a full state of the case together with their opinion thereupon to the Lords of the Committee of the Council. Their Lordships on the 27th of July, 1738, returned an elaborate report which reviews the matter from the filing of the petition, sets out the three grants with the description of the territory contained in each; the appointment of the commissioners and that they had made separate reports, etc.; sets out the report of the crown commissioners "that they took their survey of the main branch of the Potomack (called the Cohungoruton) from its confluence with the Sharando and so upward beyond the Blue mountains to its first

head." * * that said report then returns again to the Potomack and refers to the deposition of Thomas Harrison 'that the falls of the Potomack were not known fifty years ago' and the commissioners further say "that the lands at or near the Falls were not granted till 1709 and that it was not known that the river runs through the mountains till several years after, that the river loses its name at the confluence and is called by the Indians as it goes up higher Cohungoruton and Sharando and concluded "that the Fork" (that is the confluence of the Cohungoruton and Sharando) may not improperly be called the "head" which opinion they attempt to corroborate by saying "that the head of the Potomack stretches beyond the Blue mountains and that of Rappahannock reaches no higher than those mountains, they could not be intended as boundaries by the grant of King James since the one reaches above 200 miles above the other," that they conclude their report by giving several boundaries for Lord Fairfax's grant and mention what quantity of land each of those boundaries contained, etc.

The report then gives the report of the commissioners of Lord Fairfax, and it states that the dispute between the Crown and Lord Fairfax being which is the main river of Rappahannock, the north or south branch also which is the first head or spring of Potomack, they have surveyed and measured up the river Potomack from the mouth of the Sharando and that of the Rappahannock from the falls to their respective heads or springs, and are of opinion "that a line runs from the first head or spring off the south or main branch of Rappahannock to the first head or spring of the river Potomack is and ought to be the boundary line determining the said tract or territory of land commonly called the Northern Neck." The report then gives the arguments advanced on the one side to support the opinion of the King's Commissioners and on the other to support that of Fairfax's Commissioners, and concludes as follows: "upon the whole it appears to us that the dispute between the Crown and Lord Fairfax turns chiefly upon the construction of the words of the Patent upon which we have already reported what was said by the council on both sides and shall submit that entirely to your lordship's determination."

The King's Decision.

The matter was pending before the King in council until the year 1745 and on the 11th of April in that year the King finally decided it, adopting the views of Lord Fairfax's commissioners and decided that the head spring of the Potomack was the source of the Cohungoruton as surveyed and ascertained by the commissioners. (See Narrative and Critical History of America, edited by Justin Windsor, librarian of Harvard University, Vol. V, pages 276, 272, 273, etc.) (Record page 1251.)

Lord Baltimore Had Notice and Was Present at Hearing.

Lord Baltimore had notice of this proceeding and was present with Lord Fairfax at the hearing before the council. This is stated in a letter from his heir and successor, Cecilius Lord Baltimore, discussing this matter, dated London, January 5, 1754, found in the archives of Maryland. Correspondence of Governor Sharpe, 1753, 1757, pages 18 and 19, which will be more fully noticed hereafter. (Record page 1304.)

Fairfax Stone Planted in 1746.

At the time the King decided the matter ascertaining the head springs or first fountains of the Potomack and Rappahannock rivers, his Majesty appointed other commissioners to run and mark the line between the head springs of said rivers. These commissioners began the journey to the head springs or first fountains of the Potomack in September, 1746; and on the 17th day of October, 1746, planted what has ever since been known as the "Fairfax Stone" at the head spring of the Potomack—that is at the head of the Northern Branch. They then ran the line from that point to the head of the South Branch of the Rappahannock, and returned a report and map of the same which was sent to the King and by him ordered filed among the colonial records.

51 *The Fairfax Stone.*

Thus was established and settled the boundaries of the Northern Neck of Virginia, by the King in Council, in 1745, and those boundaries were marked by monuments which remain to this day. "The Fairfax Stone was easily recognized and identified September 19, 1858, by Commissioners McDonald on the part of Virginia and Lee

on the part of Maryland, and by Lieut. Michler, U. S. Topographical Engineer. (See joint report of McDonald and Lee, commissioners to their respective state legislatures dated December 21, 1859.) (Record p. 424.) Lieut. Michler in his report of the surveys made by him under the direction of said commissioners dated Maryland and Virginia Boundary survey office, Washington, D. C., December 20, 1859," describes the stone as follows: "The initial point of the work the oft-mentioned, oft-spoken of "Fairfax Stone" stands on a spot encircled by several small streams flowing from the springs about it. It consists of a rough piece of sandstone indifferent and friable, planted to the depth of a few feet in the ground, and raising a foot or more above the surface. Shapeless in form it would scarcely attract the attention of the passer by. The finding of it was without difficulty and its recognition and identification, by the inscription "Ffx" now almost obliterated by the corroding action of water and air." (Record p. 392.)

Virginia Adopts Bounds of Northern Neck as Established—1748.

The Colony of Virginia at once accepted and acquiesced in the bounds of Lord Fairfax's territory as it had been established, run out and marked by the King and at once took steps to confirm and settle the land titles within the same. And by various acts of her General Assembly she recognized the lines as so fixed. This is shown by the several acts creating new counties out of the territory west of the Blue Ridge Mountains, the limits of those counties extending always to the North Branch of the Potomack and to the Fairfax Stone, and in some instances calling for the line running from the Fairfax Stone to the head springs of the Rappahannock as run by the Commissioners who marked the boundaries of the Fairfax grant. The General Assembly of Virginia, October, 1748, passed "An act for confirming the grants made by his Majesty within the bounds of the Northern Neck, as they are now established." Acts 1748, ch. 55. 6 Hen. St. at large p. 198.

This act recites, "Whereas, in the late dispute and controversy touching the limits and boundaries of the several letters patent granted by their late majesties King Charles the Second
52 and King James the Second, unto the ancestors of the right honorable Thomas Lord Fairfax, it hath been adjudged and determined by his present majesty in council, that the said

letters patent do include all that tract or territory of land between the rivers Potomack and Rappahannock and the line now marked from the head spring of the said river Potomack to the head spring of Rappahannock, commonly called the Conway, in which said tract or territory of land as is before described, many adventurers and planters have taken up great quantities of land and obtained grants and patents thereof from the Crown under the seal of the Colony; and, whereas, the said Thomas Lord Fairfax hath consented before the King in council that the several grants and patents made by the Crown of the lands included in the boundary aforesaid should be confirmed to the several grantees, their heirs and assigns, to be held nevertheless of the Lord Fairfax, under the like rents, services, profits and emoluments, as should be paid, done and arise by and from the said grants made by the Crown," then enacts that all the grants and patents under the seal of the Colony for lands in said boundary "as the same are now settled and determined" shall be valid and effectual, etc.

By "an act for safe keeping the land papers of the Northern Neck in the Register's office," passed by the General Asembly of Virginia in October, 1785, it was enacted that all the records, documents and entries of the lands within the district of the Northern Neck should in the future be in the keeping of the Register of the land office in Richmond, etc., etc., and that "from and after the passage of this act the unappropriated lands within said district shall be subject to the same regulations, and granted in the same manner, and all *caveats* shall be proceeded upon, tried and determined, as is by law decided in cases of other unappropriated lands belonging to this Commonwealth." And "that the land holders within said district of Northern Neck shall be forever hereafter exonerated and discharged from composition and quit rents, any law, usage or custom to the contrary notwithstanding."

Formation of Counties.

That portion of the Northern Neck which lies northwest of the Blue Ridge Mountains prior to 1738 had been embraced within the limits of Orange county, Virginia. In 1738 the General Assembly of Virginia passed an act creating the counties of Augusta and Frederick. This act recites that "great numbers of
53 people have settled themselves of late upon the rivers Sherando, Cohungoruton and Opeckon and the branches there-

of on the northwest side of the Blue Ridge Mountains," etc., and enacts that "all that territory and tract of land at present deemed to be part of the county of Orange, lying on the northwest side of said mountains extending from thence northerly, westerly and southerly beyond said mountains to the uttermost limits of Virginia be separated from the rest of said county and erected into two distinct counties and parishes, to be divided by a line run from the head springs of Hedgemore river *to the head sprnigs of the river Potomack;* and that all that part of said territory lying to the northeast of said line beyond the top of the Blue Ridge shall be one distinct county and parish to be called by the name of the county of Frederick and parish of Frederick; and that the rest of said territory lying on the other side of said line beyond the top of the said Blue Ridge shall be one distinct county and parish to be called by the name of the county of Augusta and parish of Augusta."

Surveys Made for Lord Fairfax on Upper Potomack.

Lord Fairfax came over from England in 1745 and settled permanently in Virginia at "Belvoir" on the Potomack a short distance from Mt. Vernon, the home of the Washingtons. And in 1747 after the boundary question had been settled and the Fairfax Stone planted, he sent George Washington, then a youth of 17 years, and other surveyors to survey and lay off his lands west of the mountains. Washington was for two or three years engaged in this work and made a number of surveys along the Wappacomo or South Branch of the Potomack, some of which lay in what are now Hampshire, Hardy, Grant and Mineral counties, West Virginia, and are in the territory claimed by the State of Maryland in this suit.

See Sparks Life of Washington, pages 12 and 13.

Fairfax Death—Greenway Court.

Fairfax laid off for himself 10,000 acres 13 miles below Winchester, called it Greenway Court Manor, built himself a home and removed thither in —— and here he continued to live until his death in 1781.

Settlement of South Branch Country.

The fertile lands along the Cohungoruton and Wappacomo or

54 South Branch had attracted settlers before the Northern Branch was surveyed and its boundaries settled as above mentioned, but the savage Indians disputed every inch of this splendid country and many sanguinary battles were fought with them. The settlers built forts at various places along these rivers, the sites of which can be still pointed out, and gradually the country was taken possession of by the whites. In 1753 the country had become so well populated that the General Assembly passed an act in that year creating the County of Hampshire out of the western part of Frederick and Augusta. See 6 Hen. St. at large 376.

Hampshire County Created.

This act recites that whereas, part of the county and parish of Augusta lies within the bounds of the territory or tract of land called the Northern Neck belonging to the right honorable Thomas Lord Fairfax, Baron of Cameron: and it will be more convenient if the *dividing line between the said territory and the other part of this Colony* be established *as the line of the said county*, and that part of the said county be added to the county and parish of Frederick; and whereas, the said county and parish of Frederick are of a very long and large extent and inconvenient to the inhabitants thereof, then enacts that on the 1st day of May next ensuing all that part of the county of Augusta which lies within the bounds of the Northern Neck be added to and made part of the county of Frederick, and that from and immediately after the said first day of May the said county of Frederick and said part of the county of Augusta so to be added to and made part of the county of Frederick as aforesaid, be divided into two counties; and that all that part thereof lying to the westward of the ridge of mountains commonly called and known by the name of Great North of Cape Capon Mountains and Warm Spring Mountains *extending to the Potomack river* be called and known by the name of Hampshire; and all that part thereof lying to the eastward of the said ridge of mountains be another distinct county and retain the name of Frederick. (Record pp. 1268 and 1270.)

Boundaries and Jurisdiction of Hampshire County.

Thus the county of Hampshire was made to embrace all the territory within the Northern Neck, lying west of the Great North or Cacapon Mountains and Warm Spring Mountains and extending

from the Great North or Cacapon Mountains with the Potomack river to the "Fairfax Stone," and thence by the line run by the Commissioners from said stone to the head of the Rappa-
55 hannock and embraced all the territory now included in the counties of Hampshire, Hardy, Grant and Mineral.

Hampshire is the oldest county now within the limts of West Virginia by 25 years. It was created twenty-five years before the Revolution. The county seat was established at Romney on the South Branch of the Potomack, about 20 miles above its mouth, and the county authorities exercised exclusive jurisdiction over all the territory south of what Maryland calls the North Branch of the Potomack to the line of the Northern Neck, which had been established by the King between the Fairfax Stone and the head of the Rappahannock.

Hardy County Created.

Hardy county was formed in 1785; 12 Hen. St., p. 86, the act creating it providing that "the county of Hampshire shall be divided into two distinct counties by a line *beginning at the North Branch of Potomack opposite to the mouth of Savage River* and running thence in a direct course, so as to strike the upper end of the plantation known by the name of Myer's Mill, on New Creek, thence by a direct course to John Lewis' Mill, on Patterson's Creek, thence in a direct course to the highest part of the mountains known by the name of High Knob, thence, etc., etc., and all that part of the said county lying south of said line shall be called and known by the name of Hardy." (Record p. 1272.)

The "mouth of Savage River" is just above the town of Piedmont in what is now Mineral county, West Virginia. New Creek rises in what is now Grant county, West Virginia, and runs northward through Mineral county and empties into the Potomack, or North Branch of the Potomack at Keyser, the county seat of Mineral county, 23 miles above Cumberland, Maryland. Patterson's creek rises far south in Grant county and runs northward through the eastern part of Mineral and empties into the Potomack or North Branch about eight miles below Cumberland, Maryland, and about ten miles above the mouth of the South Branch.

Hampshire County Enlarged.

Hampshire county was enlarged by an act passed in 178—, 12

Hen. St. at large 597, providing that "all that part of Hardy county lying north of a line to be run from the mouth of Stony River to the High Knob shall be and the same is hereby added to and made part of Hampshire county." (Record p. 1274.)

56 *Mineral County Formed.*

Mineral county was formed in 1867 (after the creation of West Virginia) out of the western part of Hampshire county. (Record p. 1275.) The county seat is at Keyser, on the Potomack or North Branch, at the mouth of New Creek. It is a town of nearly 2,500 people and Piedmont, in the same county, about five miles above Keyser, is also a flourishing town of over 2,000 people, and Elk Garden is a thriving mining town of the same county right near the Potomack, or North Branch, and has a population of about 1,500, the population of the county by the census of 1890 being 12,085.

Grant County.

Grant county was formed out of the western part of Hardy county in 1866. (See Acts 1866, ch. 29.) The boundaries of Grant county as set out in said act are as follows: "Beginning at the Fairfax Stone at the junction of the line between West Virginia and Maryland corner to said county of Hardy, and with the said boundary line down the North Branch of the Potomack to the Hampshire (now Mineral) and Hardy county line; then with the said line southeastward, crossing Patterson Creek mountain, etc., etc." (Record p. 1277.)

The "Fairfax Stone" is therefore its northwestern corner. It had a population of 6,802 in 1890. Its county seat is Petersburg on the western bank of the South Branch of the Potomack.

Pendleton County.

Pendleton county was formed from Augusta, Hardy and Rockingham counties in 1787. The county seat is Franklin which was founded in 1794. The population in 1890 was 8,711. (Record p. 1274.)

Monongalia County.

Monongalia was the first county formed after the Revolution. It was created by an act passed in 1776 by which its boundaries are defined as follows: "All that part of said district lying to the

northward of the county of Augusta to the *westward of the meridian of the fountain of the Potomack* to the southward of the county of Yogohania and to the eastward of the county of Ohio.

Harrison County.

Harrison county was formed from Monongalia in 1784 by an act providing that "the county of Monongalia shall be divided
57 into two distinct counties by a line *beginning on the Maryland line at the Fork on the land of* John Goff, thence a direct course to the head waters of Big Sandy Creek thence, down said creek to Tygarts Valley Fork of Monongahela river, etc., etc. (Record p. 1279.)

Preston County.

Preston county was formed from Monnogalia in 1818. The line running from Fairfax Stone to the Pennsylvania line is its eastern border line and the Fairfax Stone is the southeastern corner of said county. The population of Preston in 1890 was 20,355. (Record p. 1280.)

Tucker County.

Tucker county was formed from Randolph in 1856 and the "Fairfax Stone" is a point in its boundary. The boundaries of Tucker county as set forth in said act are as follows: "That so much of the county of Randolph as is contained within the follwig boundary line, to-wit: Beginning at Fairfax Stone and running thence with the division between Hardy and Randolph counties to the corner of Pendleton county, thence * * * to the corner of Preston county and with the line of Preston county to the beginning, shall form one distinct and new county and shall be called and known by the name of Tucker county. (Record, p. 1281.) Its population in 1890 was 6,459.

The towns of Thomas with several hundred inhabitants and Davis with at least 2,000 inhabitants and several flourishing villages along the West Virginia Central and Pittsburg R. R. are situated in this county just South of the Fairfax Stone and have all grown up within the last ten years. The said West Virginia Central and Pittsburg R. R. was built within the last twelve years along the North Branch of the Potomack river, extending from a point on the Baltimore and Ohio Railroad on the South side of said North Branch about a mile above the town of Piedmont, in

Mineral county, West Virginia, along the course of said North Branch passing within a very short distance of the Fairfax stone and crossing the Alleghaney mountains just south of said stone to Elkins in Randolph county. The railroad crosses the North Branch at several points along its route and runs some distance on the north side of the river. This railroad was constructed under a charter granted by the Legislature of West Virginia so far as it lies south of said North Branch and under a charter issued by the State of Maryland so far as it lies north of said North Branch. (See chapter 85 acts 1866 and chapter 50 acts 1881 of the Legislature of West Virginia.)

58 The Baltimore & Ohio Railroad, which enters West Virginia at Harper's Ferry, follows the course of the Potomack river from a point above Martinsburg to the mouth of the Savage river, about one and one-half miles above the town of Piedmont. It runs along the south bank of the river to a point near the city of Cumberland, Maryland, where it crosses to the west side of the river and then continues on the north side until within three miles of Keyser in Mineral county, West Virginia, where it recrosses to the south side and continues on that side to a point above Piedmont about one and one-half miles, where it again crosses and leaves the river and begins to ascend the main ridge of the Allegheny Mountains. The Baltimore & Ohio Railroad Company was chartered by the states of Maryland by act of February 28, 1827, and of Virginia by act of March 8, 1827, and by act of March, 1847, page 86, the company was authorized to complete its road through the territory of Virginia over a route thereby prescribed. And, so far as said railroad was constructed north of the Potomack river, it was constructed under the authority of Maryland, and, so far as it was built south of said river, it was done under authority of Virginia. (Record, p. 1282.)

The same is true of the Piedmont and Cumberland Railroad which has been built within the last ten years from a point about one mile above the town of Piedmont to the city of Cumberland along the North Braich of the Potomack, crossing and re-crossing said river several times. It was built and is operated under charters granted by both States. (Record p. 1283.)

Possession and Jurisdiction of Virginia and West Virginia.

From the foregoing recital of facts the court will see that the

territory claimed by the State of Maryland in her said bill of complaint, was in 1745, solemnly decided by the King in council to be within the boundaries of the colony of Virginia, and, has been under the exclusive sovereign jurisdiction and control, first, of the colony of Virginia and then of the Commonwealth of Virginia; and since January 20, 1863, of the said State of West Virginia, before and since the survey of the Potomack river in 1736, by said commissioners and up to the present time. The courts of Virginia and West Virginia have administered the laws of said states in said territory ever since it came under the dominion of the white people. Their state and county governments have alone been recognized by the people residing in said territory, who have voted for and elected the county officers of said states and members
59 of the Legislature of said states and Representatives of Virginia and West Virginia in the Congress of the United State. The inhabitants of this territory have paid State and county taxes levied under the authority of said States of Virginia and West Virginia, whilst the State of Maryland has never had or exercised any sort of jurisdiction or control over any part of it, or of the inhabitants thereof; no writs from her courts have run or been served in said territory; no taxes of any kind have ever been levied by her there, or paid by the inhabitants to her, nor have any of her officers been voted for or elected by said inhabitants within the said territory. The Fairfax stone has been a point in the boundaries of the counties of Virginia ever since the formation of Frederick and Hampshire counties in 1753, and is now a point in the boundaries of the counties of Grant, Tucker and Preston in West Virginia and also of Garrett county in Maryland, as will be more fully shown hereafter.

At the time the first charter of Maryland was granted and for many years afterwards, all this territory was entirely unknown to the white people; it was an unbroken primeval forest, the abode of savage men and wild beasts.

After the year 1720 white settlers began to locate in this favored region and gradually the territory became settled up with a hardy, thrifty and intelligent population and to-day, the territory claimed by the state of Maryland is one of the most populous and thriving parts of the state of West Virginia. A number of large towns, and villages are to be found within it and its fertile valleys and its hills and mountain sides are filled with people who and

whose ancestors for several generations have adhered to and given allegiance only to Virginia and West Virginia.

Wherefore the State of West Virginia claims and pleads the said long continued, adverse and exclusive possession of and jurisdiction and control over the said territory by her and by Virginia under color and claim of title as a full and complete answer and defense to the claim set up by the state of Maryland in her said bill to said territory and she asks that she may be given the benefit of all the legal presumption and rights arising from said possession and control.

Contsruction of Maryland Charter.

The State of West Virginia further answering says that by no proper or correct construction of the charter granted by King Charles I. to Lord Baltimore in 1632 can the state of
60 Maryland claim to etxend her western boundary to the source of the south branch of the Potomac river. The territory granted by said charter is thus described in it according to the translation of Mr. Tomlins above mentioned, and there is but little difference in any of the received translations, viz: "All that part of the Peninsula or Cheronese lying in the parts of America between the Ocean on the east and the Bay of Chesapeake on the west, divided from the remnant of the same by a right line drawn from the promontory or head land called Watkins Point, beside the bay aforesaid, situate near the river of Wigheo, on the west, as far as the great ocean of the eastern coast, and between that boundary on the south as far as to that part of the estuary of the Delaware on the north which lieth under the fortieth degree of north latitude from the equator where New England is bounded; and all that tract of land within the boundaries underwritten, that is to say, going from the said estuary, called Delaware Bay, in a right line in the degree aforesaid to the true meridian of the first source of the river Pottowmack, then tending downwards towards the south to the farther bank of said river and following it to where it faces the western and southern coast as far to a certain place called Cinquack, situate near the mouth of the same river, where it discharges itself into the forenamed Bay of Chesapeake and from thence, by the shortest line as far as to the aforesaid promontory or place called Watkins Point."

The western boundary of Maryland, according to this charter,

was to be found by following the 40° from the Delaware Bay to the meridian of the first source of the Potomack river and then tending downwards towards the south to the farther bank of the said river and following it, etc. The 40° was the extreme northern boundary of the Virginia and the extreme southern boundary of the New England Colony. After Lord Baltimore's charter was granted, the territory between the 40° and the present Mason and Dixon's line—the present northern boundary of Maryland—was embraced in the charter of Pennsylvania granted to William Penn, and Lord Baltimore, after a long contest, was compelled by the King to give it up to Penn, as will be more fully shown hereafter.

This charter to Lord Baltimore is to be interpreted in the light of the knowledge and information possessed by the parties to it when it was granted so as to get at the understanding and intention of said parties.

61 *Territory Unexplored and Unknown.*

At the time this charter was granted the Potomac river had not been explored farther than the great falls. The only exploration of that river before that time of which any account remains was that made by Capt. John Smith in 1608, and he only proceeded thirty miles up the river. After exploring the country in various directions Smith went to England and in 1629 published his general history of Virginia, etc., together with a map of the country. A copy of said map is filed herewith as part of this answer, marked Defendant's Exhibit C. The portions of the country which had been explored by Smith and other white men is accurately laid down on the map, whilst the rest of the country was laid down merely from information he had obtained from the Indians. The general direction of the Potomac River as given on this map is a northwesterly direction. No tributaries appear to it until near its source, where two branches are laid down in an uncertain and rather fanciful manner.

John Smith's History and Map.

The history and map were the only information that the King and Lord Baltimore had of the country at the time the latter's charter was granted. And it is evident that this map was the guide to which they must have referred in drawing said charter as the names of the places and the orthography plainly show. The

Potomac River is represented on said map as rising in the northwest near the 40° of latitude, and the mountains are represented as rising further towards the west and north. The King did not intend that Baltimore's charter should encroach upon the boundaries of the New England Colony, consequently it was provided that it should follow the 40° of latitude. He did not *know* where the first fountain of the Potomac was—whether north or south of that degree, but it seems probable that he *believed it was north of said degree.* But being uncertain as to this he provided that the 40° should be followed, not to the Potomac, nor to the first fountain of the Potomack but to a meridian line drawn through said first fountain, because if it should turn out that said fountain was north of the meridian, the line would run into the territory of New England, but it says, then tending to the south to the farther bank of said river. The first fountain of the Potomac was believed to be north of 40°. It is evident therefore that the parties to said charter understood and believed that the first source
62 of the Potomac was near the 40° of latitude and they intended that the northern line should extend to that meridian of that fountain which was near said 40°. That it was the general belief and understanding that the source of the Potomac was north of the 40° degree is shown by the correspondence between Lord Baltimore and Governor Sharpe during the former's controversy with Wm. Penn about the boundary between Pennsylvania and Maryland as late as 1754. (See letter of Calvert to Sharpe dated January 5, 1754, on page 17, Archives of Maryland, correspondence of Gov. Sharpe). And the map of Augustine Herman made in 1670 especially for Lord Baltimore and as a means of advertising his colony also represents the Potomac as flowing from the northwest and as rising very near the 40°. See copy of this map, which is filed herewith as part of this answer, marked Defendant's Exhibit B. And in the instructions given to the surveyors who surveyed the Northern Neck in 1736-7, they were "directed to take the latitude and observe particularly where said river" (the Potomac) "intersected the 40° degree. This shows that more than a century after the date of the Maryland charter it was believed by Fairfax and the Virginians that the source of the Potomac was north of the 40°. The King therefore in granting this charter never intended that its boundary should extend a hundred miles south of the 40° north latitude

(Byrd's manuscript). At the time the charter of Maryland was granted that the Potomac was unknown above the falls. Afterwards it was found that the river extended beyond the Blue Mountains and divided into two branches at what is now Harper's Ferry—called the Cohungoruton and the Sharando—and in 1736 the said commissioners took the affidavits of Thomas Harrison, who testified that he had lived 40 miles below the Falls of the Potomac since he was a child, that he was then 63 years old, that 50 years before that date, 1736, the Falls were unknown as ever he had heard of. But about 36 or 37 years before he had heard people talk of going up there to fish but he never heard that any one ventured up to the Falls until about that time, that he had heard of the Falls about 50 years.

South Braich Had a Different Name.

The name Cohungoruton was applied to all that part of the Potomac extending from the confluence with the Sharando, to the source at the Fairfax stone. The South Branch had an enitrely different name being called the Wappacomo. See the map
63 and report and proceedings of the commisioners who laid out the Northern Neck in 1736. Map of Fry and Pierre Jefferson published in 1755, and the map made and published in ———called "A map of the country between Albemarle Sound and Lake Erie, comprehending the whole of Virginia; Maryland, and Delaware and Pennsylvania with parts of several others of the United States of America. Engraved for Thos. Jefferson's Notes on Virginia." Copies of said map are filed herewith as parts of this answer. Marked defendant's exhibit B, F and G respectively.

North Branch Wider and Deeper at the Confluence.

Again at the mouth of the South Branch and for several miles above it the Potomac proper or North Branch is now the wider and deeper stream, and it was so in 1737 when the survey of the Northern Neck was made. See report of the late Hon. Charles J. Faulkner to Gov. Floyd, of Virginia, made in 1832; found in Lewis' History of West Virginia, ch. 17. Also in Kercheval's History of the Valley, &c. (Record p. 1284.)

Mr. Faulkner returned with his report many valuable historical documents bearing on this boundary question as will be seen from his report. Among said documents was "No. 12, original letters

from John Savage, one of the surveyors dated January 17, 1737, stating the grounds upon which the commissioners had decided in favor of the Cohungoruton over the Wappacomo, as the main branch of the Potomac. The former he says is both deeper and wider than the latter;" and also, "No. 13, letter from Charles Carter, Esq., dated January 20, 1537, exhibiting the results of a comparative examination of the North and South Branches of the Potomac. The North Branch at its mouth, he says is twenty three poles wide; the South Branch sixteen, etc."

Mr. Faulkner also returned No. 10, the original field notes of the survey, of the Potomac river from the mouth of Shenandoah to the head spring of the said Potomac river by Benjamin Winslow, one of the surveyors in 1736-7.

Unfortunately these and the other documents returned by Mr. Faulkner have all been lost or destroyed during the late war and the State of West Virginia is unable to produce them, but she offers the said report of Mr. Faulkner as the best historical evidence of the facts stated therein which can now be obtained.

North Branch the Straight River at Confluence.

64 And the State of West Virginia further says that besides being deeper and wider at the mouth of the South Branch and for a long distance above it, the North Branch is the straight river at the point of confluence of the North and South Branches, the general course of both the valley and the river are the same for some distance below and above the mouth of the South Branch and the latter flows into the former almost at right angles. The valley of the North Branch is plainly a continuation of the valley of the Potomac river below the mouth of the South Branch extending in the same northeastern direction for many miles; the valleys of the South Branch, of Pattersons Creek, and of New Creek, and of Great Cacapon and Little Cacapon are all parallel with each other and extending almost at right angles from the Potomac river proper.

South Branch but a Tributary.

The South Branch bears to the Potomac river exactly the same relation that Pattersons Creek and New Creek and Great Cacapon and Little Cacapon bear—they are all manifestly but tributaries of the main river as it is formed by nature. It is larger and deep-

er than the latter streams but otherwise is like them in general appearance and in the direction it flows and the manner in which it empties into the main, continuous stream.

North Branch Called the Potomac.

In this answer all that part of the Potomac river above the mouth of the South Branch is spoken of as the North Branch for the sake of convenience, but in point of fact all that part of said river extending from the mouth of the South Branch to about the town of Piedmont in West Virginia and Westernport in Maryland, about 30 miles above the city of Cumberland, Maryland is known as, and called by the inhabitants of that country, the "Potomac River." As you ascend the river from Piedmont it begins to be known as the North Branch and is generally so called as it flows through the Alleganey mountain region. But that part of the river between the mouth of the South Branch and where Piedmont now stands has always been called the Potomac river since the name Cohungoruton was dropped which seems to have been in the latter half of the 18th century. On the other hand the South Branch, ever since the Indian name of Wappacomo was dropped, has been known and called by no other name except the "South Branch" throughout its whole course from its mouth to its source.

See testimony of W. C. Clayton, Record p. 1875.

65 *Topography of the Country.*

The general course of the Potomac river and valley from the mouth of the Shenandoah to where it strikes the main Alleganey mountains at Piedmont is northwesterly. The country through which it extends consists of alternate mountains, or ranges of hills and valleys running in a northeast and southwestward direction, parallel with the main Alleghany range, and the Potomac river and valley cut across these mountains, hills and valleys almost at right angles. These intersected valleys are drained by streams that follow their course and empty into the main river. The South Branch is one of these streams and though it is larger and longer than any of the others, in other respects it is exactly like them.

The Potomac river rises out of the main Alleganey mountains and persistently cuts its way across the small intervening mountains and hills, which have the same general direction as the great Appalachian chain, in a south-eastern direction towards the sea;

the South Branch is but one of the many streams that flow into it, it is but an arm of the main body, and though it is a large arm and is longer than the main trunk from the point of junction with that trunk to the head, yet that fact does not make it the main body, and the head of the body will not be sought for at the extremity of the arm simply because of the length of the arm.

The state of West Virginia therefore insist that the King in Council correctly decided in 1745 that the head of the North Branch was the first source or fountain of the Potomac river, and she insists that said North Branch is the Potomac river mentioned in the charter of Maryland, and that Virginia and West Virginia have lawfully and rightfully had possession of and exercised sovereign jurisdiction and control over all the territory south of said North Branch and west of the meridian drawn from said Fairfax Stone to the Pennsylvania line.

King's Decision Binding on Lord Baltimore.

The state of West Virginia further answering says the said decision of the King in Council as to the location and boundaries of the Fairfax title was conclusive and binding upon the Lord Proprietor of Maryland and upon all the world. The King had exclusive jurisdiction of all questions relating to the boundaries of the colonies and had absolute power to fix such limit as he thought proper to the territories of the several colonies. Charles Lord Baltimore, who was the Lord Proprietor of Maryland when said
66 proceedings were had and who lived six years after that, never questioned either the justness or the propriety of that decision, althorugh he had notice of the proceeding and was present at the hearing before the king. He might have asked for commissioners to act on his behalf in that proceeding if he had deemed it necessary or advisable, but he evidently considered that his interests would be safe in the hands of the king as against Lord Fairfax.

Lord Baltimore Declines to Reopen the Question.

Charles Lord Baltimore, was succeeded in about 1751-2 by Frederick Lord Baltimore, and in 1753 he appointed Horatio Sharpe, Governor of the Colony of Maryland. At that time Lord Baltimore was in the midst of his controversy with Penn, in regard to the boundary line between Maryland and Pennsylvania. Penn was claiming the right to territory lying south of the 40° parallel, and

Baltimore was vigorously resisting this claim, and, as his charter was the older, insisted on holding up to that degree of latitude according to the calls of his charter. But the King was favoring Penn, and it seems had ordered a temporary line to be run for the peace of the two provinces. Baltimore was very anxious that this line should be north of the heads of the Potomac and other rivers flowing into the Chesapeake Bay, otherwise the Pennsylvanians would claim the right to navigate those rivers. Gov. Sharpe had evidently been instructed to inquire into these matters. And in the correspondence between Sharpe and Baltimore, in relation to the matter, the former made the first suggestion that was ever made, so far as appears to this respondent, that a mistake had been made by the King in fixing upon the North instead of the South Branch as the Potomac River, and he endeavored to get Lord Baltimore to reopen that question. But the latter declined to do so unless both Lord Fairfax and the Governor and Colony of Virginia, would consent to it. This consent was not obtained and consequently no ateion was taken by Baltimore, all of which will more clearly and fully appear from the correspondence between Gov. Sharpe and Lord Baltimore, which is published in the "Archives of Maryland" in the volume entitled, "Correspondence of Governor Sharpe—1753-1757." The following abstracts from said correspondence sustain the correctness of the above statements:

Correspondence Between Baltimore and Gov. Sharpe.

In a letter from Sharpe to Cecilius Calvert, (the secretary
67 of Lord Baltimore, it is presumed), dated August 20, 1753, speaking of the Pennsylvania boundary matter, Sharpe says:

"It is to be observed that the temporary line is drawn 15 miles south of the most southern part of Philadelphia, which takes away from his Lordship much good land. It would be of great advantage and it is much to be wished you could continue the line due north (after it has touched the circle), to the 40° or at least 39° 56′.

A line due north on that latitude will run a little north of one of the bendings of the Potomack, much depends thereon in respect to the boundary with Lord Fairfax for by what I have yet seen I doubt that Branch which runs about 8° west by the Alleghaney mountains will be deemed the Fountain head of the Potomack, etc., is to be desired if you could obtain said latitude of 39° 56′ and his Lordship

will even then be considerable loser according to his first grant nor will you then be within 15 miles of Philadelphia, although to the northward of the latitude thereof.

It is impossible to fix how far north would be a good boundary for Maryland, on account of the uncertainty of the draughts and impracticability of making observations and remarks necessary for that advice. I can only say what you know that the more northward the better," pages 1 and 2.

Letter from Sharpe to Calvert, September 14, 1753, page 5, speaks of Mr. Emory's return from running the north line, and sends Emory's plat with his remarks and observations; in his remarks, he says:

"The north line will not touch the heads of any rivers, nor will the circle around Newcastle, as run by Mr. Dalker in 1732, affect the head of the bay, or any of the rivers as far as he is capable of judging," etc., etc.; "but," Sharpe continues, "opinions you see and a few inaccurate observations are the best guides we yet have, and I see no probability but of remaining still in the dark, unless the Penns will give free liberty to execute what the council have thought necessary to be performed," etc., etc. "Mr. Cresap gave it as his opinion to the council, that the temporary line is to the northward of any bendings of the river Potomac, and that the South Branch runs 60 or 80 miles farther west than the head spring of the Northern Branch, upon which representation of his by advice of the council, I have wrote the following letter to Lord Fairfax," (see letter, post).

"If you can obtain from Messrs. Penns to go to the latitude of 40° upon Susquehanna in order to run a west line thence for your northern boundary, you may give up so much of the eastern side of that river as lies north of the temporary line;" * * * "and several plans and observations being laid before us, we are
68 of opinion that so much uncertainty appears at present, as will with respect to the heads of the rivers running into Chesapeake Bay, as to the circle of Newcastle and the latitude of the most northern bend of the Potomac, that we would not presume to advise any particular boundary unless a due north line could be run from the middle of such an east and west line, as may be agreed on between the proprietors across the Peninsula, as also a due west radius run from the centre of the circle of Newcastle and the lati-

tude of the most northern bend of the Potomac be taken by observation."

The following is the letter written by Governor Sharpe to Lord Fairfax, as stated in his letter to Calvert, of Sept 14, 1753:

"Lord Baltimore was pleased to charge me with an enquiry into the true meridian and place of the Fountain Head of Potomack. The best information I have been hitherto able to procure gives me reason to believe there has been a mistake in fixing the spring head of the North Branch, since the length with the other circumstances more properly denotes the Southern Branch, commonly called Wappacomo, to be the main and principal course of that river. I am the more willing to be persuaded of the truth of this representation from the considerable advantage that will accrue to your Lordship. That Branch I am informed has never been thoroughly explored and traced to its source, but I flatter myself with having your Lordship's concurrence for such an examination into its course, length, width and depth as may bring this matter to a nearer degree of certainty, and if that should appear to be the Fountain Head of the Potomack River, I shall not question but your Lordship will be for taking such measures as may ascertain the mutual limits of the two Proprietorships Agreeable to the direction and true intention of their respective charters."

Lord Fairfax's reply to this letter is dated September 24, 1753—page 7—in it he uses this language:

"I am entirely (satisfied) that the south would be much to my advantage and therefore think it improper for me to appear therein, and that the Governor of Virginia and your Excellency should transact that affair. If his Lordship should obtain his demand, I must insist upon a new line between his Majesty and me to the southward."

On the 29th of November, 1753, Sharpe writes to Calvert informing him that he had received the above reply from Fairfax, and continues, page 14:

"My intent to examine the two Branches of Potomack I have hinted to the Governor of Va. and writ to Col. Cressop to know whether he will undertake that business or not and return
69 me an accurate description of their courses, rapidity and depth and the latitudinal difference of the places of the spring heads, but I suppose the severity of the winter will hinder

him from proceeding on those enquiries this three or four months at least."

January 5, 1754, the first reply of Lord Baltimore to any of the foregoing letters from Governor Sharpe was written. It is dated London, January 5, 1754, and is written by Calvert to Sharpe. He first acknowledges receipt of the above letters of August 22 and September 14, and after speaking of the Penn boundary matter, says (see pages 18 and 19):

"My Lord approves of yr endeavor with Lord Fairfax in Virginia to fix the Branch of Potomack River by another Branch runs southwest, it will enlarge and extend Maryland much more than the Branch runs northwest and it will advantage Lord Fairfax as to his particular tract of land, yet it will be very difficult to gain the Colony of Virginia's consent to resettle, as it will be the loser by altering the course of the river, which has been settled by order of the Crown and of which the late Lord Baltimore had notice and was present with Lord Fairfax at the hearing before the Council, whose report the King confirmed and accordingly the spring head has been determined by the Virginia Commissioners Exparte with Maryland Commissioners Lord Baltimore praying none. Lord Fairfax and the Colony of Virginia's Charter of the courses of the Rappahannock and. Potomack the latter fixed boundary bet. Maryland and Virginia accordg to the order of the King and Council in 1736 and 1737." * * * "His Lordship desires you to obtain Col. Cresop's opinion certain by observation of the North temporary line. etc., etc.," and then speaks of the importance of the location of the North bend of the Potomack, and says, "If the bend is over the line the Pennsylvanians will claim water passage to the spring head and on that River, it is of consequence to know upon settling the North temporary line," etc.

Letter from Sharpe to Calvert dated London, April 17, 1754—page 44 *et seq.*

On page 49 is the following:

"By Lord Fairfax's letter to you his lordship declines having to do with any resettlement of the course of the Potomac river. The branch called the South Branch which you seem to apprehend will be much more beneficial to Maryland, as in length south-westward, will depend on proof, as its fountain head instead of the spring head of the said river, determined by the Virginia commissioners in 1736 and 1737. If the South Branch runs as you appre-

70 hend, it will certainly be of great advantage to the encrease of Maryland, and also may be to Lord Fairfax' tract of land by the spring head of the Potomac lying more westward than the determined head of Potomac as above settled.

However you ought, before you make an attempt, to be well grounded how the inclinations of the Governor, the Virginians and Lord Fairfax stand, to a new settlement of the course and fountain of Potomac with Maryland. If they oppose, the Crown, it is most likely, will side with them. The tryal of the South Branch of Potomac as to its advantages as may turn out, his lordship is not against Mr. Cressaps essay therein: provided he does not bring upon him too great cost thereby of which, if you find it absolutely necessary to send him; you must bargain with him reasonably."

Letter from Sharpe to Calvert January 6, 1754, page 70.

"It is owing to Col. Cressaps absence from home among the Virginians on Ohio, that I am not able yet to comply with your requisition concerning the latitude of the most northern bend of the Potomac. I some weeks since writ two letters desiring him to return me a copy of his map of that river signed and authenticated, which I will transmit with the description of distances and bearings of the river heads on the eastern shore as soon as the surveyors make their return which I expect in about 3 weeks or a month at farthest.

P. S.—I have this instant received a letter from Col. Cressap with the plan and certificate concerning the North Branch of Potomac and the temporary line as run by him."

See page 72. Letter from Calvert to Sharpe December 10, 1754. See page 130.

"Col. Cressaps map of the North Branch of the Potomac river with respect to the north temporary line removes the doubt of the bend touching the line, there being south of the line considerable distance of country between the line and the head, admitting extensive passage to the spring head of that river." * * * "The observation in 1669 at Newcastle and also the act of Virginia concerning the north boundary is of service as it points the opinion of that colony about the north line of Maryland, out of which the latter was taken, etc., etc.

Observation on the Correspondence.

From the foregoing correspondence it appears that Gov. Sharpe

had been led to believe from information received from Col. Cresap that the South Branch was the larger stream and that its source was further west than that of the North Branch, and that the interest of his patron, Lord Baltimore, would be much advanced if a re-settlement of the location of the head spring could be brought about, and that he was quite active in endeavoring to bring this about, but that Lord Baltimore was not impressed with the idea and had but little faith in being able to accomplish any-
71 thing in that direction, and that he recognized that the decision in Fairfax's case was so far conclusive and binding upon him, that unless the consent of Lord Fairfax and of the Governor and of the Colony of Virginia could be obtained, it was useless to attempt to reopen and resettle the question; and he would not even consent that Col. Cresap should investigate the matter unless he would make a bargain beforehand that it should not bring very much costs upon his lordship. Sharpe was very active, and says in his letter of No. 29, 1753, above quoted, that he had hinted to the Governor of Virginia his intent to examine the two branches of the Potomac. But the Governor of Virginia never consented to have the question re-opened and Lord Fairfax refused to have anything to do with it. Consequently, nothing was done by Lord Baltimore. Whether Col. Cresap was ever employed to survey the two branches of the Potomac with a view to this question, this respondent is not informed and has not found anything to show that he was. It has been claimed that the map made by Col. Cresap, which is to be found on page 72 of the Volume of the Archives of Maryland from which the above correspondence is taken, was made at the instance of Lord Baltimore to be used in setting up a claim that his boundary extended to the meridian of the South Branch of the Potomac. But it seems that such was not the case. It will be seen that in the letter of Calvert to Sharpe, dated January 5, 1754, and from the whole correspondence, that Lord Baltimore was at that time deeply interested in and concerned about his controversy with Penn in regard to his Northern Boundary and that he was anxious to find the latitude of the most northern bend of the Potomac River as it had an important bearing on any agreement he might make with the Penns as to that boundary he being unwilling to adopt any line that would strike the Potomac and throw any part of that river within the bounds of his northern neighbor. He accordingly desired his Gov. Sharpe to have Col. Cresap take observation of the

north temporary line and ascertain the latitude of the most northern bend of the Potomac. And in Sharpe's letter to Calvert of June 6, 1754, above, he says he has been unable to comply with his requisition concerning the most northern bend of Potomac; that he had some months before written two letters desiring Cresap to return to him *a copy of his map of that river, etc.*, and in a postscript to that letter he says he has just received a letter from Col. Cresap with the plan and certificate concerning the North Branch of the Potomac and the temporary line as run by him.

72 Now this is evidently the map which is published in the Archives, and it was made for the information of and as an assistance to Baltimore in his controversy with Penn and not with a view to any proceeding against Virginia. That this map was made solely with reference to this controversy with Penn is more clearly shown by the letter from Calvert to Sharpe dated December 10, 1754, page 130 above quoted; he says, "Colonel Cresap's map of the north bend of the Potomac river with respect to the north temporary line removes the doubt of the bend touching the line, there being south of the line considerable distance of country between the line and the bend admitting extensive passage to the spring head of the river." It will be observed that the temporary line is laid down on this map, and it seems clear that this is the map that was referred to in the above correspondence.

No Action Taken Before Revolution.

And the state of West Virginia says that nothing further was done in the matter either by Lord Baltimore, the proprietor of the province of Maryland, or by his governor or colony while said province remained subject to the British crown. No action whatever was taken by Lord Baltimore to re-settle the western boundary while he retained his proprietary rights over the province of Maryland, although he had become advised by Colonel Cresap's map of the facts as to the length and location of the two branches of the Potomac and notwithstanding that the King in Council had full and exclusive jurisdiction of the matter and there was nothing to prevent the institution of proceedings before His Majesty to that end.

And so the matter remained until after the Revolutionary war had ended and in the meantime the Colony of Virginia, as has been shown above, continued to exercise jurisdiction over the territory south of the North Branch, and Lord Fairfax claimed to the boun-

daries established by the King in 1745, and granted patents for the lands in said territory and surveyed off for his own use large tracts that he called manor lands.

Maryland Land Bounty.

It appears that during the Revolutionary war the state of Maryland by various acts of her General Assembly agreed to give bounties of 50 acres of land each to her soldiers in said war. And by an Act of 1781, chapter 20, all the lands within the state in
73 Washington county, westward of Fort Cumberland, with certain exceptions specified therein were appropriated to discharge the engagement of land theretofore made to the officers and soldiers of said state, and the residue to the use of the public, as the General Assembly should thereafter direct. (Record p. 1307.)

And by a resolution adopted by the General Assembly of Maryland at its April session in 1787, the Governor and Council was authorized to appoint and employ some skillful person to lay out the manors and such parts of the reserves and vacant land belonging to the state, lying to the westward of Fort Cumberland, as he might think fit and capable of being settled and improved, into lots of 50 acres. (Record p. 1307.)

Francis Deakins Survey of Military Lots.

In 1788 the General Assembly of Maryland passed an act (Acts 1788, ch. 44) reciting the above mentioned acts and resolution and the appointment of Francis Deakins, and that said Deakins had finished the said survey and returned a general plat of the country westward of Fort Cumberland, on which 4165 lots of 50 acres each are laid off besides sundry tracts which have been patented, distinguishing on the plat those lots which have been settled and improved from those which remain uncultivated; that said Francis Deakins had returned two books entitled A. and B., in which are entered certificates of all the lots before mentioned; that 636 of said lots had been settled and improved by settlers; that there were about 2475 soldiers entitled to said bounty, and that about 100 lots ought to be set apart for the recruiting officers; therefore enacted that 2575 of the aforesaid lots lying in the most fertile part of the country and contained in the following limits, to-wit: beginning at the mouth of Savage River and running with the North Branch of the Potomac River to the head thereof, *then with the present sup-*

posed boundary line of Maryland until the inter-section of an east line to be drawn from *said boundary line* with a North course from the mouth of Savage River, will include the number of lots aforesaid to be distributed by lot among the said soldiers and recruiting officers, and their legal representatives, etc. And also "that the lots so granted to the officers aforesaid shall be adjacent to those hereinafter directed to be distributed to the soldiers, and shall be contained within the following limits, to-wit: by extending the aforesaid north course from the mouth of Savage River, until its intersection with an east line to be drawn from *the afore-*
74 *said supposed boundary line of* Maryland will include the necessary number allowing to each officer or his representatives four lots as aforesaid."

And also further enacted that any of the said lots not therein appropriated should be liable to be taken up in the usual manner by warrants, etc.

Said act continues as follows: "And be it enacted, that the line to which the said Francis Deakins has laid out the said lots, is in the opinion of the General Assembly, far within that which this state may rightfully claim as its western boundary; and, that at a time of more leisure the considerations of the Legislature ought to be drawn to the western boundaries of the state, as objects of very great importance." Said act further provides that said general plat and books of certificates be lodged in the Land Office, and that said book of certificates of the 4,165 lots aforesaid be considered to all intents and purposes, as record books of the Land Office. (Record, p. 1308.)

Deakin's Map, Etc.

A duly certified copy of said map is filed herewith as part of this answer, marked Defendant's Exhibit "H," and also copies of the courses and distances of all the lots in said map, which adjoin the line drawn from the Fairfax stone to the Pennsylvania line, marked Defendant's Exhibit I. The said Francis Deakins, was directed to lay out all the lands in Maryland lying west of Fort Cumberland. and in doing so he ran a due north line from the Fairfax stone to the Pennsylvania line, and laid out the lots as far westward as this line but no further. It will be seen that the boundaries of the lots, the courses and distances of which are filed herewith as above sated, all call for a due north line. This is the line from the Fairfax

stone to the Pennsylvania line. And said act of 1788, speaks of this line as the "present supposed boundary line of Maryland," although it states that said lines is, in the opinion of the General Assembly, far within that which this state may rightfully claim as its western boundary. This language can not be construed to be the assertion of a claim to go to the head of the South Branch.

First Constitution of Virginia.

The first Constitution of Virginia was adopted June 29, 1776, (1 Rev. Code of Va., page 33). Section 21 of the constitution is as follows:

The territories contained within the charter erecting the colonies of Maryland, Pennsylvania, North and South Carolina, are
75 hereby ceded, released and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction and government, and all other rights whatsoever which might at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potomac and Pokomoke with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been made or shall be made thereon. The western and northern extent of Virginia shall in all other respects stand as fixed by the charter of King James the first, in the year one thousand six hundred and nine and by the public treaty of peace between the courts of Great Britain and France in the year one thousand seven hundred and sixty-three, unless by act of the legislature, one or more territories shall hereafter be laid off and governments established westward of the Alleghaney mountains. And no purchase of land shall be made of the Indian natives, but on behalf of the public by authority of the General Assembly."

At the time this constitution was adopted Virginia held up to the North Branch of the Potomac and to the Fairfax Stone and these were also the boundaries of Maryland and as has been shown above neither Lord Baltimore nor the Colony of Maryland had asserted or taken any steps to assert or establish any other boundaries for that Colony. Virginia recognized the North Branch as the Potomac river; this is the Potomac river mentioned in that constitution of which she retained the free navigation and use with the property of the Virginia shore or strands bordering thereon and

all improvements which had been made and should thereafter be made thereon.

Controversy Over the Southern Boundary.

From the time the charter of Maryland was granted there had been serious controversy between that Colony and Virginia as to the Southern boundary line of Maryland, and this controversy had resulted in several armed conflicts between citizens of the two Colonies. The principal cause of this conflict was the claim of Wm. Claiborne to certain territorial rights granted him by the King of trading with the natives and of the settlement of Kent Island by Virginians prior to the date of the Maryland charter. These controversies and conflicts are a part of the history of the two colonies, and in them was involved also the rights of the respective colonies to the navigation and fishing privileges of the Potomac river. This state of affairs as to this southern boundary continued up to
76 and after the Revolution, and shortly after the close of the war the states of Virginia and Maryland each appointed Commissioners to endeavor to arrive at some adjustment of these difficulties. Maryland appointed Daniel, of St. Thomas Jennifer, Thomas Stone and Samuel Chase, and Virginia appointed George Mason and Alexander Henderson. Upon the invitation of Gen. Washington these Commissioners met at Mt. Vernon and on the 28th day of March, 1785, they agreed on a compact to be adopted by the two states. This compact was approved, ratified and confirmed by the General Assembly of Virginia by an act passed January 3, 1786, which recites the compact in full and is found in 1 Rev. Code of Va. page 53, ch. 18. (Record p. 1313.)

The Compact.

This compact in section 6 provides that "the river Potomack shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland and of the United States, etc.

The seventh section provides that the citizens of each state respectively shall have full property in the shores of Potomack river adjoining their lands, with all emoluments and advantages thereunto belonging, etc., but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both the states, etc., etc.

The eighth and ninth sections provided for mutual regulations for preserving the fish, performance of quarantine and keeping open the channel, and of erecting light-houses, beacons, etc., on the Potomack river.

The tenth section provides for the exercise of concurrent criminal jurisdiction over the river Potomack by both states under certain restrictions.

And the eleventh section provides for the service of process issued in either state upon its citizens on said river, etc. Said compact was also ratified and adopted by the state of Maryland. The greater part of the provisions of this compact had special reference to that part of the Potomac which is navigable and which lies below the limits of the State of West Virginia but some of them applied to that river throughout its whole length, and at the time said compact was made the State of Virginia claimed to the North Branch of the Potomac and it was well understood that said compact related to said Branch and not to the South Branch so far as it was applicable to the river above the junction of said Branches. And the State of West Virginia says that it has been so understood by the
77 people of said states ever since said compact was made and that both states have enjoyed the rights and privileges upon said North Branch secured by said compact ever since that time and continue to this day to exercise and enjoy them.

The State of Maryland was well aware when this compact was made that the State of Virginia claimed that the North Branch was the Potomac river proper above the mouth of the South Branch. and the former did not insist upon any rights in or to the South Branch in said compact and by entering into it, she in effect recognized and accepted the North branch as the boundary line between the two states, and it was so understood at that time and has been so understood ever since by the people living along said North Branch and by all the people of said states, and they have constantly acted upon that understanding.

It was after this compact that Francis Deakins laid out the military lots under the authority of the State of Maryland as hereinbefore stated, and in doing so adopted a due north line from the Fairfax Stone as the western boundary of that state. And although the legislature of that state in acting upon his report declared that said supposed boundary line is in their opinion far within that which the state might rightfully claim as her western boundary, yet the language does not indicate that this legislature intended to

assert a claim to go to the South Branch, but rather that the Fairfax Stone was not planted at the true fountain head of the North Branch, and that said fountain head was further west than said stone, and at a later date, as will appear herafter, this very claim was made by said state through her commissioners.

Maryland and Virginia Resolutions for Appointment of Commissioners.

In 1795, in 1801 and again in 1810 the General Assembly of Maryland adopted resolutions providing for the appointment of Commissioners to meet such persons as the state of Virginia should appoint "to adjust and settle by compact the southern and western boundaries of the state and fix the dividing line and boundaries, etc."

The state of West Virgina says that she is informed that no Commissioners were in fact appointed by Virginia in response to the resolutions of Maryland, of 1795, 1801 and 1810, and that Virginia was not willing even to enter into a discussion of her right to the territory between the two branches of the Potomac river,
78 and that in fact nothing was done by Virginia until after Maryland passed the act of 1818.

The state of West Virginia says that she has not had access to the said resolutions of Maryland of 1795, 1801 and 1810, but she believes and charges that they contained no assertion of any claim to go to the south branch of the Potomac as a boundary line of said state.

Maryland Act of 1818.

In 1818 the Geenral Assembly of Maryland passed an act, (chapter 206 acts of 1818), proposing to Virginia the appointment of Commissioners to settle the western boundary of said state, and agreeing to adopt "*the most western source of the North Branch of the Potomac*" as the point from which the western boundary should start. (Record, p. 1317.)

Virginia Act of 1822.

On the 28th of February, 1822, the Legislature of Virginia passed an act, (chapter 14, acts 1822), which proivdes that "the Governor, etc., is hereby authorized to appoint three Commissioners on the part of the state to meet such Commissioners as may be appointed

for the same purpose by the Commonwealth of Maryland to settle and adjust by mutual compact between the two governments the western limits of this state and the dividing line between this state and the Commonwealth of Maryland; to commence at the Fairfax Stone on the head waters of the North Branch of the Potomac river and to run a due north course to intersect the line between this state and the state of Pennsylvania." Said Commissioners were required to report their proceedings to the General Assembly for confirmation or rejection, etc. (Record, p. 1319.)

Work of the Commissioners.

Under these resolutions, commissioners were appointed both by Maryland and Virginia and they went to the Fairfax stone in 1824. The Maryland commissioners refused to begin at the Fairfax stone, because they claimed that it was not at "the most western source of the North Branch of the Potomac River." They claimed that the most western source was a point about one mile west of the Fairfax stone, and that the difference between the two places of beginning embraced a section of country about one mile in width and thirty-six miles in length. The Virginia act required her commissioners to begin at the Fairfax stone. This difference between the two commissioners put an end to any further negotiation and consequently nothing was done.

Report of Maryland Committee—1832.

In 1825, the Maryland Legislature pased another resolution providing for the appointment of commissioners, and that the Governor of Delaware should act as umpire in case of disagreement. And in 1832, a committee of the legislature of that state made an elaborate report to the legislature on the question of the boundary line of the state, in which what purports to be a history of the matter is given, and the various acts and resolutions of the legislature of the two states above mentioned are referred to. In speaking of the passage of the resolution of 1818 above mentioned by the legislature of Maryland, the committee says: "This state had now become wearied with her efforts to reclaim the territory south of the North Branch and hence this act of 1818, chap. 206, in proposing to Virginia the appointment of commissioners, agrees to adopt the most western source of the North Branch at the point from which the western boundary shall start." And the report closes with a recom-

mendation of certain resolutions providing for appointment of commissioners, and that the Governor of Delaware should act as umpire.

This report and the accompanying resolutions were transmitted to the Governor of Virginia in June, 1832, and are found in the Journal and Documents of the House of Delegates of Virginia of 1832-33.

Appointment of C. J. Faulkner.

On the 20th of March, 1832, the Legislature of Virginia passed an act (acts 1832 page 308) directing the Governor to procure an authenticated copy of the record of a decision made some time anterior to the Revolution before George II. in a case brought before his Majesty in Council by the late proprietor of the Northern Neck of Virginia and the late proprietor of the western domain of Maryland in a controversy and dispute touching the limits and boundaries of the several letters patent granted by Charles II. and James II. for lands lying on both sides of the River Quiriough or Potomac, etc. (Record, p. 1322.)

Under this act the Governor of Virginia appointed the late Charles J. Faulkner, and he collected a large amount of valuable historical information and a large number of important documents relating to the western boundary matter, and in November, 1832, made an able and exhaustive report to the Governor on the subject and returned with his report the evidence and documents collected by him. This report was published in full and may be found in full in Kercheval's History of the Valley of Virginia, chapter 13, and in Lewis' History of West Virginia, chapter 17. But the documents returned by him were not published, and have been lost.

Act of Virginia of 1833.

In 1833 the legislature of Virginia passed an act (acts 1833 page 24) similar to the above recited act of 1822 except that it provided for the boundary line "to commence at the Fairfax Stone or at the first fountain of the Cohungoruton or North Branch of the Potomac river and to run a due north course," etc. and also that if Maryland failed to appoint commissioners then the Virginia commissioners should run and mark the line, etc. (Record, p. 1322.)

Maryland Resolutoin of 1834.

The State of Maryland seems to have regarded the last act of Vir-

ginia as a refusal to accept her overtures for a settlement of the boundary question and on the 14th of March, 1834, the legislature of Maryland adopted a resolution (acts 1833-34, resolution No. 80) reciting "that it is necessary for the peace and security of our people and the dignity of the state that our southern and western boundaries should be finally settled and defined:

That this state has seen with deep regret the refusal on the part of Virginia to leave the settlement of these boundaries to friendly arbitration as proposed by this state"; and then resolved "That the Attorney-General of this state be and he is hereby requested to cause suit to be instituted in the name of the State of Maryland against the Commonwealth of Virginia in such manner and form as may be technically required in the Supreme Court of the United States for the purpose of procuring a final legal adjustment and settlement of the southern and western boundaries.

It further provided for the employment of counsel and then resolved that "all adversary proceedings on the part of the State against the State of Virginia shall cease at any time before suit brought or judgment rendered when that state shall accept the overture of Maryland made by her resolution at December session 1831. (Record, p. 1324.)

81 *Suit Brought.*

In pursuance of this resolution the Attorney-General of Maryland brought a suit in this honorable court on the 20th day of October, 1834, in the name of the State of Maryland against the Commonwealth of Virginia for the settlement of the western boundary of said state. (Record, p. 1360.)

Suit Dismissed.

On the 21st of March, 1835, the legislature of Maryland passed a resolution (Acts of 1835 Resolution No. 99), reciting certain portions of a messsage of Governor Tazewell of Virginia, in which he states that the act of Virginia passed March 5, 1833, was intended as an acceptance of the proposition of Maryland in the amicable settlement of the question between the states, and that the determination of Maryland to seek a decision of her rights by the judicial authority of the union was probably occasioned by a misapprehension of the terms of that enactment of Virginia, which was susceptible of satisfactory explanation, etc. And then repeals the res-

olutions of 1833 by which the said suit was directed to be brought and directs the Attorney-General to discontinue all proceedings under the same. And also authorized the Governor of Maryland to transmit a copy of said resolution to the Governor of Virginia and communicate to the government of Virginia the earnest desire of the State of Maryland to settle and finally adjust the long pending question by amicable negotiations.

Acting presumably under this resolution, the Attorney-General of Maryland, on the 25th day of January, 1836, dismissed said suit.

Maryland Act of 1852.

After this the matter appears to have rested without any definite action being taken until the 27th day of March, 1852, when the Legislature of Maryland passed an act (Acts 1852 chapter 275) as follows:

"Whereas, it is of great importance that the western territorial limit of the state of Maryland be clearly defined and her boundary be permanently established; and whereas, the true location of the western line of Maryland between the states of Maryland and Virginia beginning at or near the Fairfax Stone on the North Branch of the Potomac river, at or *or* near its source, and running in a due north line to the state of Pennsylvania, is now lost and unknown and all the marks have been destroyed by time or otherwise;
82 and whereas, the states of Virginia and Maryland have both granted patents to the same tracts of land at or near the supposed line, and as suits of ejectment are now pending in the circuit court of Alleghany county, in the state of Maryland, by persons holding under Maryland patents against persons now in possession and holding land under patents granted by the state of Virginia, which cannot be justly settled without establishing said boundary line;

"Therefore, section 1. Be it enacted by the General Assembly of Maryland, that the Governor be and he is requested to open a correspondence with the Governor of Virginia in relation to tracing, establishing and marking the said line, and in case the Legislature of Virginia shall pass an act providing for the appointment of a Commissioner to act in conjunction with a Commissioner on the part of Maryland in the premises, then and in such case, the Governor be and he is hereby authorized and requested to appoint a Commissioner who, together with the Commissioner who shall be appointed on

the part of Virginia, shall cause the said line to be accurately surveyed, traced and marked with suitable monuments beginning therefor at the said Fairfax Stone and running thence due north to the line of the State of Pennsylvania.

SEC. 2. And be it enacted, that it shall be the joint duty of the Commissioners after running, locating, establishing and marking the said line, to make a report setting forth all the facts touching, locating and marking said line; and it shall be the duty of the Commissioner of each respective state to forward copies of the joint report to each of their respective legislatures; and upon the ratification of said report by the state of Virginia and the state of Maryland, through their respective legislatures, the said boundary lines shall be fixed and established so to remain forever, unless changed by mutual consent of the two states."

At the same session a similar act was passed by the Maryland legislature in relation to the southern boundary of that State. (Record, p. 1360.)

Virginia Act of 1854.

On the third of March, 1854, the General Assembly of Virginia, passed the following act, (acts 1854, ch. 1):

"Whereas, the General Assembly of Maryland has passed an act for running and marking the boundary line between that state and the state of Virginia, beginning therefor at the Fairfax Stone on the Potomac River some times called the North Branch of the Potomac River at or near the source and running thence due north to the line of the state of Pennsylvania: and whereas the legislature of Maryland has requested the appointment of a Commissioner on the part of this state to act in conjunction with the Commissioner of Maryland to run and mark said line: therefore, be it enacted,

1. That the Governor appoint a Commissioner who together with the Maryland Commissioner shall cause the said line to be accurately surveyed, traced and marked with suitable monuments,
83 beginning therefor, at the Fairfax Stone, situated as aforesaid, and running thence due north to the line of the state of Pennsylvania."

Said act then directs the Commissioners after running, locating, establising and marking the said line, to make a report setting forth all the facts touching the same to their respective legislatures, and then provides that:

"Upon the ratification of such report by the legislatures of the states of Virginia and Maryland the said boundary line shall be fixed and established to remain forever unless changed by mutual consent of the said states." (Record, p. 1361.)

Appointment of Commissioners Lee and M'Donald.

Under these acts the Governor of Maryland appointed Thomas J. Lee, Commissioner on the part of Maryland, and the Governor of Virginia appointed Angus McDonald, Commissioner on the part of Virginia.

These Commissioners, Lee and McDonald, met at Washington City, August 18, 1858, and applied to the Secretary of War for the services of an officer of the United States Engineers to aid them in the discharge of their duties. The Secretary promptly detailed Lieutenant N. Michler of the U. S. Topographical Engineers for that purpose.

The Commissioners with Lieutenant Michler met at New Creek in Virginia, now Keyser, West Virginia, and proceeded thence to the Fairfax Stone which was reached and easily recognized on the 19th of September, 1858.

Michler's Line Run.

Lieut. Michler was first assigned to work on the southern boundary line and it was not until June, 1859, that he began surveying the line from the Fairfax Stone to the Pennsylvania line. The work was prosecuted during the remainder of that year and on the 20th of December, 1859, Lieut. Michler made a report of the work done to said commissioners; and thereupon the commissioners made a joint report to the legislatures of their respective states, transmitting therewith said report of Lieut. Michler with the maps made by him and the correspondence between said Commissioners. This report and documents, together with a message of Governor Wise of Virginia, prepared before the expiration of his term of office, was transmitted to the Legislature of Virginia by
84 Governor Letcher on the 9th of January, 1860, and the whole is filed herewith as part of this answer as the same was afterwards published in pamphlet form marked "Defendant's Exhibit J," and the following named parts of the same is desired to be taken as part of this answer, viz: the messages of Governors Letcher and Wise, pages 3 to 7 inclusive, joint report pages 8 and

9, the instruction to Lieut. Michler on page 13; Lieut. Michlers report pages 15 and down to * on page 16, then from * on page 25, to the conclusion of the report page 31. It appears from said message of Governor Wise that Commissioner McDonald made a special separate report in addition to the joint report required by both Commissioners, but the State of West Virginia says that she has not been able to find said report or any copy of it. (Record p. 373.)

The State of West Virginia also files herewith as part of this answer marked "Defendant's Exhibit K," a duly certified copy of a book prepared by said Commissioner Lee, which is now in the Land Office of Maryland, containing the correspondence between him and Mr. McDonald and certain letters of his to the Governor of Maryland, concerning the boundary question.

The Commissioners Disagree.

It will appear from the above mentioned message of Governor Wise and from the said correspondence between the Commissioners, that they differed as to the powers and duties imposed on them by the acts of the Legislatures under which they were appointed. Mr. Lee contended that they "were simply directed to retrace and mark certain boundary lines named in the acts" under which they were appointed, and that the Virginia act of March 26, 1858, establishing the commission, acknowledged and adopted the meridian line from the Fairfax Stone to the southern line of Pennsylvania as the boundary between the two states.

Mr. McDonald contended that the Commissioners were authorized to ascertain the true boundaries and were not bound by the lines specified in the act. And he claimed that the charter of Maryland required the meridian line to be run in order to obtain a starting point in the 40′ of latitude and that the boundary line was not to follow from said starting point the said meridian line, but to diverge south-eastward until it struck the Potomac river proper—that is at some point where it had become a river—which point he claimed would be about the town of Piedmont.

85 *M'Donald Sent to England.*

Owing to this difference in view the Legislature of Virginia took no action on the report of said Commissioners, but did adopt a resolution under which Mr. McDonald was commissioned to go to

England to procure documentary and other evidence to establish the true boundary between Virginia and the state of Maryland. Mr. McDonald sailed for England in June 1860 and after that never acted any further in conjunction with Mr. Lee in locating, tracing and marking either the western or the southern boundary line of Maryland. Mr. McDonald procured a large amount of documentary evidence on these boundary questions and subsequently made a report and returned this evidence to the Governor of Virginia, but nearly if not all of it has been lost or was destroyed during the late war and cannot now be obtained.

Maryland Adopts the Michler Line.

But on the fifth of March, 1860, the legislature of Maryland passed "An act for the establishment of the southeastern and northwestern boundary line between this state and Virginia, and making further appropriation to complete the survey and making of the same." (See acts 1860, ch. 385). Said act is as follows, so far as it relates to the western boundary:

SECTION 2. And be it further enacted, "That the northwestern line of this state, is a line commencing at the Fairfax stone, at the head of the North Branch of the Potomac river, and running thence due north to the southern line of Pennsylvania, as surveyed in the year 1859, by the commissioners appointed by the states of Maryland and Virginia in conformity with the laws passed by the said states for that purpose."

SECTION 3, appropriated $10,000 "for the payment of the states' proportion of such expenses as may be required to complete the survey and record of such line," etc. (Record, p. 1362.)

Michler Line Marked by Maryland.

Mr. Lee, as commissioner of the state of Maryland in the summer of 1860, employed two surveying parties "to continue the tracing of the line between the points determined astronomically by Lieut. Michler," etc., and "to mark the line at every prominent point and on an average about every half mile, etc. And in August of that year he reported to the Governor of Maryland that the work was about completed. See the correspondence of commissioner Lee, a copy of which is filed herewith as above stated, as "Exhibit
86 K." (Record, p. 418.) And the State of West Virginia also files herewith as part of their answer a copy of the map

made by Lieut. Michler marked "Defendant's Exhibit O." And in the message of Governor Hicks, of Maryland, to the legislature at the January session, 1862, he says:

"Report of the Commissioner on the part of Maryland to ascertain and define the southeastern and the northwestern boundaries between Maryland and Virginia are herewith submitted. I am informed by the commissioner that the tracing and marking of the western line of the state from the Fairfax stone to the northern boundary of Maryland, was completed during the summer of 1860. The work was commenced in 1859, with the co-operation of Virginia in conformity with chapter 275 of the acts of 1852. The commissioner of Virginia failed to join in the completion of the survey, but it being a matter of great importance to Allegheny county that it should be no longer delayed, the commissioner for Maryland completed the work as required by chapter 385 of the acts of 1860."

See Senate Journal and documents of Maryland, 1861-2.

Mr Lee in his letter to Mr. McDonald of May 8, 1860 says:

"In the act of 1852, in relation to retracing and making the *western* line, Maryland yielded, as she has unfortunately too often done, the point at issue between the commissioners of 1818," etc.

Difference Between Michler's and Deakin's Lines.

The report of Lieutenant Michler shows that the meridian line run by him strikes the Pennsylvania line about three-quarters of a a mile west of the old line run by Francis Deakin, which he says is that "generally adopted by the inhabitants as the boundary line," and he further says that if his line "is adopted it will cause great litigation, as the patents of the lands call for the boundary as their limits."

Maryland Claims to Michler Line.

It will thus be seen that between the Michler line of 1859 and the Deakin's line of 1788, there is a triangular shaped strip of land having its apex at the Fairfax stone and its base three-quarters of a mile in length on the Pennsylvania line and an altitude of thirty-seven miles. The state of Virginia has granted patents for the lands on the west of the old Deakin's line and those claiming under these Virginia patents have held up to said Deakin's line. After

the Michler line was run and marked the citizens of Maryland began to claim the right in some instances to extend their
87 holdings up to the Michler line, and in others to take up the land between said Deakin's and Michler line. This has led to many disputes, and to some serious conflicts and litigation, as Lieut. Michler predicted it would. Ever since said Michler line was run and marked as aforesaid, the state and people of Maryland have claimed and insisted that it was the true boundary line between the states. And never since the passage of the said act of 1852, by the Maryland Legislature, has there been any claim put forward by or on behalf of said state that the meridian of the South Branch was the boundary line, or that any other line was the true boundary except the Michler line, until the bill was filed in this suit by the Attorney-General of Maryland.

Maryland Abondoned Claim to South Branch.

The state of Maryland, first by the act of 1818 and afterwards and much more clearly and conclusively by the acts of 1852 and 1860, abandoned all claim or pretence of claim to the territory south of the North Branch of the Potomac, and since the act of 1852, she has not only acquiesced in the claim of Virginia and West Virginia to and their jurisdiction over the territory south of the North Branch, but she has insisted that the said meridian line run by Lieut. Michler from the Fairfax stone to the Pennsylvania line, is her true western boundary. Never since the formation of West Virginia has the state of Maryland asserted or set up any claim against her to the said territory south of the North Branch, until this suit was brought, nor had she asserted any such claim against Virginia from 1852 up to the date of the creation of the state of West Virginia. The only disputed boundary question between Maryland and West Virginia since this state was formed, has been as to whether the Michler line or the old Deakin's line was the true boundary between the two states.

Maryland's Recognition of the North Branch as the Boundary.

The following recited facts will show that the State of Maryland has almost continuously recognized the North Branch of the Potomac as the boundary line between her and Virginia and West Virginia, and has acquiesced in the exercise of jurisdiction by said states over the territory lying south of said North Branch.

First, by the constitution of Maryland of 1851, article 8, section 2. Said section is as follows:

"When that part of Alleghany county lying south and west of a line beginning at the summit of Big Back Bone or Savage Mountain where that mountain is crossed by Mason and Dixon's line, and running thence by a straight line to the middle of Savage River where it empties into the Potomac river, thence by a straight line to the nearest point or boundary of the State of Virginia, thence with said boundary to the Fairfax Stone, shall contain a population of ten thousand, and the majority of the electors thereof shall desire to separate and form a new county and make known their desire by petition to this legislature, the legislature shall direct, at the next succeeding election, that the judges shall open a book at each election district in said part of Alleghany county and have recorded therein the vote of each elector 'for or against' a new county. In case the majority are in favor then said part of Alleghany county to be declared an independent county, and the inhabitants whereof shall have and enjoy all such rights and privileges as are held and enjoyed by the inhabitants of the other counties in this state," etc.

See Charters and Constitutions, part 1, page 857, (Record, p. 1363.)

This constitution was formed by a convention which met at Annapolis, November 4, 1850, and completed its labors May 13, 1851. It was ratified by the people June 4, 1851.

Here is a distinct recognition by the organic law of the State of Maryland, that the Savage river empties into the Potomac river and that the boundary of the State of Virginia runs to the Fairfax Stone, and this in 1851. The Savage river empties into the North Branch above the town of Piedmont. The line here set out was to run "to *the middle* of Savage river, where it empties into the Potomac river, thence by a straight line to the nearest point or boundary of the State of Virginia." This language is used no doubt on account of the dispute between the two states as to whether said boundary was the north or south bank of the Potomac. But the intention of the makers of this constitution was that the line should go to whichever bank of the river was the true boundary and then follow it to the Fairfax Stone, which has been shown is at the head of the North Branch.

By Act of 1852.

The next year after the constitution was adopted the legislature of Maryland passed the act of 1852 ch. — for the appoint-
89 ment of commissioners to run the western boundary and directed them to commence at the Fairfax stone, as shown hereinbefore.

By Act of 1872 Creating Garrett County.

The new county provided for by this section of the constitution of 1851 was not formed until after the war, in point of fact not until 1872. By an act approved April 1, 1872, by the legislature of that state, it is provided as follows:

"That all that part of Alleghany county lying south and west of a line beginning at the summit of Big Back Bone or Savage mountain, where that mountain is crossed by Mason and Dixon's line and running thence by a straight line to the middle of Savage river where it empties into the Potomac river; thence by a straight line to the nearest point or boundary of the State of West Virginia, then with the said boundary to the Fairfax stone shall be a new county to be called the county of Garrett, provided, etc., etc."

This language it will be observed is identical with that of the 2d section of art. 8 of the constitution of 1851 above quoted. Here then is a distinct recognition of the North Branch and the Fairfax stone as the boundary of the State of West Virginia, twenty years after the adoption of the constitution of 1851 and the passage of the act of 1852. (Record, p. 1363.)

By Charter of Piedmont and Cumberland R. R. Co.

The Piedmont and Cumberland Railway Company was incorporated in 1886 under the general incorporation laws of the State of Maryland, and by chapter 59 of the acts of the legislature of that state of 1888 the charter of said company was amended. Said act contains the following language:

"For the purpose of constructing and maintaining and operating a railroad in Maryland between a point in Alleghaney county, Maryland, opposite to the junction of the West Virginia Central and Pittsburg Railway Company with the Baltimore and Ohio Railroad Company, above Piedmont in West Virginia to a point at or near Cumberland in said Alleghany county."

The junction of the West Virginia Central and Pittsburg Railway Company, with the Baltimore and Ohio is on the West Virginia side of the North Branch of the Potomac above the town of Piedmont.

90 *By Martenet's Map.*

By chapter 94 of the acts of the Legislature of Maryland of 1865, the sum of $3,000 was appropriated to assist Simon J. Martenet in completing and publishing his map of Maryland as proposed in his published description and provided that said map, when completed and published, should be examined by the Superintendent of Public Instruction, and upon his certificate that the same has been completed and published in the manner and style proposed and set forth in the published appeal of said Martenet, to the Legislature, it should be the duty of the State Librarian to receive of said Martenet 150 copies of his large map of Maryland on rollers and 150 copies of said map in atlas form, (ten copies of each whereof shall not be colored) and to hold the same subject to the provisions thereafter contained in said act. Said act then provides that the State Librarian shall retain the ten copies not colored, of each of the said map and atlas, and directs how he should dispose of the other copies so received, for the use of the state and the different counties of the state. (Record, p. 1364.)

The said map was completed and published by said Martenet as provided by said act and was approved and accepted by the officer named in the act. And there are still in the office of the State Librarian of Maryland, at Annapolis a number of copies of said map, one of which has been procured by the State of West Virginia, through the courtesy of the Attorney General of Maryland and is filed herewith as part of this answer, marked "Defendant's Exhibit L."

The copy filed herewith is one of those that was not colored, but it clearly designates the territory south of the North Branch, as "West Virginia" and makes said Branch the boundary line between said states and the meridian line from the Fairfax Stone to the Pennsylvania line as the western boundary of Maryland.

On those copies of said map which were colored the said boundaries were distinctly shown by the different coloring, as well as by the lines themselves.

All Maps Show North Branch as Boundary.

And the State of West Virginia further says that every map of Maryland or of Virginia or of the United States of America that has been published since the survey of the Fairfax Grant, and its confirmation by the King in 1745 has represented the North Branch of the Potomac as the boundary line between Virginia or
91 West Virginia and Maryland, and has shown all the territory lying south of said Branch as being in Virginia or in West Virginia since the formation of this state.

By Her County Authorities.

The county authorities of Alleghany county, and Garrett county, in Maryland have entered into contracts with the county authorities of Mineral county, in West Virginia, and have built several bridges at different points across the North Branch of the Potomac river by each contributing a portion of the expenses thereof, and have thus recognized the said river as the dividing line between said counties. (Record, p. 1371.)

By Her Commissioners in Controversy with Virginia.

From the year 1870 to 1877, the states of Maryland and Virginia were engaged in an effort to settle the southern boundary between those states. Commissioners were appointed in 1870 on the part of each state to endeavor to settle and adjust said boundary by amicable agreement, but after carrying on negotiations until in the year 1873, the commissioners were unable to agree on any settlement that was mutually acceptable, and they made their final reports to governors of their respective states. A copy of the final report of the Virginia commissioners is filed herewith, marked "Defendant's Exhibit M," as published by the state of Virginia, entitled "Final Report of the Virginia Commissioners on the Maryland and Virginia Boundary, to the Governor of Virginia." Also a copy of the report of the Maryland commissioners as the same appears in the house documents of Maryland of 1874. These reports each contain elaborate statements of the case on the part of Maryland and Virginia respectively in which many matters pertinent to the issues involved in this suit are discussed and the state of West Virginia respectfully refers the court to these statements as sustaining her claims in this answer, that the state of Maryland regarded the con-

troversy as to the western boundary, so far as her claim to go to the South Branch of the Potomac as finally settled by her acts of 1852 and 1860. (Record, page 118.)

By Her Governors.

The state of West Virginia further answering, says that the governors of the state of Maryland have recognized the jurisdiction of the state of West Virginia over the territory south of the
92 North Branch of the Potomac, now claimed by Maryland as the said line, by honoring and accepting requisitions issued by the governors of West Virginia on the governors of Maryland for the apprehension of persons charged with crimes committed within said territory. August 19, 1875, Governor Jacob, of West Virginia, issued a requisition on the Governor of Maryland for the apprehension of Augustus Summers, charged with grand larceny, committed in Mineral county, West Virginia.

A similar requisition was issued in September 3, 1877 for William Bartholomew, charged with horse stealing in said Mineral county.

Also on July 2, 1880, for M. F. Inskeep charged with forgery committed in said Mineral county.

And on December 23, 1881, for William Harris charged with attempt to murder committed in said Mineral county.

These requisitions were honored and accepted by the governors of Maryland, and in at least two of the cases above named the fugitives were arrested in Maryland under the warrants of her governor issued on said requisition and returned to the authorities of said Mineral county, and were there tried for the offenses with which they were charged. (Record, pp. 1366 to 1368.)

And on the other hand in October, 1872, the governor of Maryland issued a requisition on the governor of West Virginia for William Craig charged with rape committed in Alleghany county, Maryland, alleging that said Craig had taken refuge in Mineral county, West Virginia. And a warrant was on said requition issued by the governor of West Virginia to the sheriff of Mineral county to arrest said fugutive and deliver him over to the State of Maryland. (Record, p. 1369.)

And the state of West Virginia alleges that in various other ways and at various other times than those above mentioned, the State of Maryland has recognized the right of West Virginia to the territory south of the North Branch of the Potomac and west of the Fairfax

Stone, and acquiesced in the exercise of exclusive jurisdiction and control of West Virgina over said territory.

And so she says that the State of Maryland, by her constitution of 1851, by the various acts of her legislature above mentioned, by the said acts of the governor in delivering up fugitives from justice and by her county authorities and in various other ways, has recognized the right of West Virginia to said territory.

How exclusive and complete has been the jurisdiction of the State of West Virginia over the territory between the North and South branch of the Potomac is shown by the foregoing acts, and also by the testimony of Honorable William C. Clayton, found on pages 1873 to 1876 inclusive. His deposition was taken July 21st, 1906. Mr. Clayton testifies that he is seventy-five and one-half years old, and is a lawyer and resides at Keyser in Mineral county, West Virginia; that he was born in Hampshire County, of which the County seat is Romney. The town of Romney is situated on the South branch of the Potomac, and that he lived there from the time he was eleven years old until 1872, when he moved to Keyser, the County seat of Mineral County; that in his early day the Western boundary of Hampshire County extended to the Maryland line on the West into the Alleghany Mountains; that the North branch of the Potomac, until you get below the South branch, was held to be the dividing line between Hampshire County and Maryland, and that the State of Virginia exercised jurisdiction South and West of the North branch since he had known it; that Mineral County was created out of the Western part of Hampshire. Keyser, the County seat of Mineral County, is on the North branch of the Potomac, a little way from the foot of the mountains, twenty-three miles West of Cumberland, Maryland. Mineral County was created by the Legislature of West Virginia in 1864 and has been embraced within the jurisdiction of the State of West Virginia since the creation of the State. He further testifies that the territory lying West of the South branch of the Potomac, and extending to the line of Preston County, West Virginia, if extended, would embrace part of Pendleton, all of Grant, nearly all of Mineral (in fact it would embrace all of Mineral), parts of Hampshire, Hardy, Randolph, Tucker and Preston, and would cut the State of West Virginia entirely in two. Mr. Clayton further testifies that he practiced law in Romney from 1859, also in Hardy County; that the Courts of

Maryland have never exercised any jurisdiction over the above mentioned territory, but that the Courts of West Virginia have exercised jurisdiction there; that the territory has been represented in Congress by representatives from Virginia and then West Virginia and he gives the names of representatives and testifies that the then representatives in Congress resided at Keyser, Mineral County, embraced within the territory above mentioned; that that territory is in the northern Judicial District of the United States for the State of West Virginia, and that the Federal Courts of the District of Maryland have never exercised any jurisdiction there; the schools and roads have been maintained entirely by West Virginia; Maryland has never collected any taxes in that territory. He further testifies that the South branch of the Potomac is always spoken of as the South branch. The other branch is sometimes called the North branch, and sometimes only the Potomac, and he states that his experience in copying deeds is that the lines call for the Potomac on the North branch, but on the other branch they always call for the South branch, and he testifies that this jurisdiction of the State of West Virginia has extended along the North branch of the Potomac up to the locality of the Fairfax Stone, though he had never been to the stone itself. Mr. Clayton represented that section of the State of West Virginia in the State Senate of 1875, and, at that time, lived at Keyser; that the Honorable Henry G. Davis was at one time a member of the United States Senate; when he was elected he lived at Piedmont in Mineral County, right at the foot of the Alleghany Mountains on the North branch of the Potomac.

This valley of the South branch of the Potomac was settled prior to 1746. This appears from the journal of Thomas Lewis, one of the surveyors who accompanied the Commissioners, who were appointed to run the dividing line between Lord Fairfax's Northern Neck of Virginia and the Colony between the head springs of the Rappahannock and the Potomac, as they had been surveyed and located by the former Commissioners in 1736. This journal is found on pages 1952 to 1972 inclusive. This line, as run by these Commissioners, crossed the South branch of the Potomac a quarter of a mile above Looney's Creek, which is about Petersburg, the County seat of Grant County. See bottom of page 1958, where this language is used:

> "2880 ye mountain foot left off & Encamped on Looney's Creek which runs into the South Br. about

> ¼ of a mile Below where we crost the River & is about the same Distance at this place. One of our men wounded a Bair which made his escape."

Just prior to that time he had stated that they reached the South branch of Wappacomo, alias the South fork of the South branch at the end of 682 poles on the fortieth mile from the head of the Rappahannock, and he speaks of a family of poor Dutch people living on the South fork of the South branch, and that they reached Wappacomo, alias the South branch, at the end of 1320 poles on the fifty-first mile; that the Commissioners were encamped three miles down the river and a man by the name of Coburn lived there; that they got provisions for their journey at this point. And, on page 1965, he states that after going to the Fairfax Stone, at the head of the North branch, they ran the line back with the corrected course and arrived at Coburn's, where they dined, having been nearly starved on account of their provisions giving out He says:

> "We went to our old camping place when hear before where we pitched or tents. Several of the inhabitants came to see us whom our men engaged to wrestle with them diverted us very much."

So that from prior to 1746 this territory has been inhabited by Virginians, men who lived under and recognized the authority of and were loyal to the State of Virginia until the creation of West Virginia, and to West Virginia up to the present time.

Recapitulation.

That the North branch of the Potomac is the correct boundary line between the States of Maryland and West Virginia, and that the source of said branch is the true head spring or first fountain of the Potomac River, is proven by the facts above set forth, which may be summarized as follows:

First: By the stream itself. The North branch of the Potomac rises under the backbone of the Alleghany Mountains and it has cut its way persistently and continuously in a Southeastern direction, first in a Northeast and then in a Southeastern direction from that point across the intervening ridges and valleys until it passes beyond the Blue Ridge at Harpers Ferry. The course of the Alleghany Mountains is Northeast or Southwest, the main backbone dividing the waters of the Potomac from the waters of the Monon-

gahela and Ohio. On the South of the Potomac are the valleys of the Stoney River above Piedmont, of the New Creek at Keyser in Mineral County, of Patterson's Creek below Cumberland, of the South branch a few miles Eastward, of the great Cacapon and finally of the great Shenadoah at Harper's Ferry. All of these streams lie between mountain ridges parallel with the main backbone of the Alleghanies, the streams following the valleys between the mountain ridges. All of the mountains have local names, being a part of the great Alleghany or Appallachian range of mountains. This main Potomac River cuts across the ends of these valleys, and the South branch is but one of all these tributaries, flowing into the main stream nearly at right angles, just as does New Creek, Pattersons Creek and the other streams named. The fact that the South branch is a longer stream than the North branch is not a determining factor in this question. The Missouri is much the longest branch of the Mississippi, but the straight and shorter branch bears the name of the main river. The proof shows that when the Commissioners, appointed by the King and Lord Fairfax to survey the Potomac River, reached the mouth of the South branch, they took measurements and observations, in order to determine, as they were obliged to do, which was the main river, and they found not only that the North branch was the straight stream, but that it was both deeper and wider than the South branch, the North branch, at its mouth, being twenty-three poles wide and the South branch sixteen. See record bottom of page 1297, where Honorable Charles J. Faulkner gives a list of the documents procured by him in his investigation of this question in 1832, under the authority of the Legislature of the State of Virginia. He says that he returns with his report:

No. 10. The original field notes of the survey of the Potomac river, from the mouth of the Shenandoah to the head spring of said Potomac river, by Mr. Benjamin Winslow.

No. 11. The original plat of the survey of the Potomac river.

No. 12. Original letter from John Savage, one of the surveyors, dated January 17, 1737, stating the grounds upon which the commissioners had decided in favor of the Cohongoroota over the Wappacomo, as the main branch of the Potomac. The former, he says, both wider and deeper than the latter.

No. 13. Letter from Charles Carter, Esq., dated January 20, 1737, exhibiting the result of a comparative examination of the

North and the South branches of the Potomac. The North branch at its mouth, he says, is twenty-three poles wide, the South branch sixteen, &c.

These documents were returned with Mr. Faulkner's report, but unfortunately were lost or destroyed during the War and cannot be found among the records of the State of Virginia at Richmond or elsewhere. Under the circumstances this report of Mr. Faulkner is the best evidence that could be obtained and is competent evidence under the authorities.

Second: The Maryland charter, in describing the territory thereby granted, after calling for a line as the Southeastern boundary to run as far as the great ocean on the Eastern coast, uses the following language:

> "And between that boundary on the South as far as to that part of the Estuary of the Delaware on the North, which lieth under the fortieth degree of the North latitude from the equator where New England is bounded; and all that tract of land within the boundary underwritten, that is to say, going from the said Estuary called Delaware Bay in a right line in the degree aforesaid to the true meridian of the first source of the River Pattowmack, then tending downwards towards the South to the farther bank of the said River and following it to where it faces the Western and Southern coast as far as to a certain place called Cinquak, situate near the mouth of the same river, where it discharges itself in the forenamed Bay of Chessepeake, &c."

At the time this charter was granted no one knew where the head spring or first fountain of the Potomac was. There are a good many things that indicate that it was believed to be North of the fortieth parallel of latitude, that is, that it rose considerably North of the present Mason and Dixon line, the Southern boundary of Pennsylvania. At that time the Potomac River had not been explored above the great falls, just above Washington City. This appears from the report of the Commissioners, who were appointed to survey out Lord Fairfax's grant, as set forth in Byrd's manuscript. They were directed to take the depositions of such persons as they should find proper to examine, touching the Rivers Rappahannock and Potomac, and how far they were known by these names

at the time of the last grant made by King James II to the Lord Culpepper, and how far the bounds of the territory aforesaid were at that time reputed to extend, or have been since bounded by the proprietors thereof or their agents. (Record, page 1214.)

Among others, they took the affidavit of Thomas Harrison, who testified that he had lived, ever since he was a child, about forty miles below the falls of the Potomac, except about three years, when he lived at Hunting Creek; "that about Sixty three years ago the uppermost Settlement on Potowmack was no higher than Hunting Creek, which he takes to be about 15 Miles below the Falls, that in the war with the Susquehanna Indians the people who had seated there were beaten off from their Settlements and obliged to retire lower down the River, that about 50 years ago Sundry Familys Seated again about Hunting Creek but at that time the Falls of Potowmack were not Known as ever he heard of, But about 36 or 37 Years ago when he went up to live at Hunting Creek he had heard people talk of going up thither to fish, but never heard that any one adventured up so far as the Falls about that time the Indians frighting all People from Venturing so far that he hath heard of the Falls he believes about 50 Years or near that time.' (Record, page 1222.)

The Potomac was known at that time by the Indian name of Quiriough. It bore this name, it seems, as far as Harper's Ferry the mouth of the present Shenandoah River. There the two branches had different names, one, the present Shenandoah, being called Sherando, and the other Cohongoruton, so that if the charter of Lord Baltimore is to be interpreted according to the facts as they existed at the time it was granted, the head of the Potomac River would be at the confluence of the Sherando and the Cohongoruton at Harpers Ferry, and the meridian spoken of in the charter would be a line drawn from that point North to the fortieth degree of latitude.

But the name Cohongoruton was dropped and changed subsequently by the English settlers to Potomac, and evidently it was in the mind of the draftsmen of the charter, or of the authorities who granted it, that in running it out, the fortieth parallel of latitude should be followed Westward to the source of the main stream of the Potomac, heading somewhere near to said fortieth parallel, either North or South of it. It could never have been contemplated that after the River approached near to that parallel, as it does

in the neighborhood of Cumberland, Maryland, that then the territory should run off into an elongated triangle Southward, as must be done if the line is to run to the head of the South branch. It was believed that the course of the river was continually Southeast, and that the territory would be compact by running the meridian through its head spring, whether it were North or South of the fortieth parallel. It is manifest, therefore, that the Commissioners, in 1736, adopted the reasonable construction of the charter, as applied to the river as then known, rather than to the river as it was known at the time the charter was granted, which they probably ought to have adopted as the criterion. At the time the charter was granted the only map of the country was one made by Captain John Smith in 1629. He had explored the Potomac River only about thirty miles from its mouth. He constructed his map accurately so far as the country had been explored by himself and other white men. The rest of it was laid down through information he obtained from the Indians. His map is Exhibit C with the answer of the State of West Virginia, the second map following page 362 in the printed record. This shows the Potomac running in a Northwesterly direction without any tributaries, until near its source, where two branches are laid down in an uncertain and rather fanciful manner. The Potomac is represented on this map as rising in the Northwest, near the fortieth degre of latitude, and the mountains are represented as rising further toward the West and North. The King did not intend that Lord Baltimore's charter should encroach upon the boundaries of the New England Colony. Consequently it was provided that it should follow the fortieth degre of latitude. Being uncertain as to whether the first fountain of the Potomac was North or South of this parallel of latitude, he provided that the line should follow the parallel, not to the first fountain, but to a meridian line drawn through the first fountain, so that if it should turn out that the fountain was North of the fortieth degree of latitude, the line of the territory should tend Southward with the farthest bank of the Potomac River. In other words, it was expected that the parallel, in order to reach the meridian of the first fountain, would cross the Potomac River, the fountain being believed to be at a point Northwestward where the fortieth degree of latitude would cross the stream. The call then is "thence tending or verging Southward to the farthest bank of the stream," that is, it was not supposed it would run due

South, but would have to tend Southward to get back to the main stream, which had already been crossed. It turned out, however, on actual survey, that the River makes a bend beyond Cumberland to the South, and heads at the foot of the Backbone Mountain, and, in view of this situation, it has been contended that, in order to comply with the call of the charter, it is proper to follow the meridian line of the first fountain due South from the Pennsylvania line, and then follow the South bank of the stream to the bay. Now we submit that it would be very unreasonable to pass by this head spring of the North branch and run to a more remote point to the head of the South branch, because it is a little longer and possibly a little farther West than the head spring of the North branch.

Third: But it seems to us useless to argue this on an open undecided question. It is *res adjudicata*. The decision of the King in council in 1745, adopting the report of Lord Fairfax's Commissioners, and deciding that the head spring of the Potomac was the source of the Cohongoruton, or North branch, as surveyed and ascertained by said Commissioners, is final, conclusive and binding not only upon the Colony of Virginia and Lord Fairfax, the immediate parties to the controversy, but also upon Lord Baltimore and the Colony of Maryland, and, in fact, upon all the world. The King had exclusive jurisdiction of all questions relating to the boundaries of the Colonies and had absolute power to fix such limit as he thought proper to the territories of the several colonies. "Jurisdiction in all cases relating to the boundaries between provinces, the dominion and proprietary government is, by the common law of England, exclusively vested in the king and council." 1 Ves. Sen. 447; 9Pet. 745, 748; 8 Wheat, 375. And even in a controversy between a Lord proprietor of a province and the crown, the king was the only judge and was presumed to act with entire impartiality and justice in reference to all persons concerned as well those who were parties to the proceeding before him as others not parties, who might yet be interested in the adjustment. This was the law at the time of the dispute between Lord Fairfax and the crown, and governs and controls the present legal aspect of the dispute between Maryland and West Virginia. 1 Ves. Sen. page 447. (See report of Charles James Faulkner on this question, Record, page 1293.) That such was regarded as the law, is not only shown by the decision above cited, but by the actual practice in such cases. For example, the province of Mary-

land was granted to Lord Baltimore out of the territory that had previously been granted to the London Company; in other words out of the territory of Virginia. And the authorities of the Virginia Colony were not consulted about it, and, whilst they objected, they obtained no relief.

The territory of the province of Maryland, as granted to Lord Baltimore, extended Westward with the fortieth parallel of latitude, but, subsequently, William Penn was able, by his power at the Court, to obtain a grant overlapping this territory about two degrees, so that the Southern boundary of Pennsylvania, as finally located on Mason and Dixon's line, is about the thirty-eighth parallel of latitude and covers a large and valuable portion of the territory originally granted to Lord Baltimore. The proprietors of Maryland protested against this violatioin of their territory and contested the matter with Penn, but were never able to maintain their former boundaries. See statement on the part of the Commissioners of Maryland before the arbitrators in 1872, beginning on page 80 of the printed record, and especially pages 113 to 116 inclusive, and also page 118, where the Maryland Commissioners use this language:

> "Thus ended a controversy of more than a century's duration. And the results of losses to Maryland of territory once clearly included within the limits of her charter, may be estimated thus: To Delaware one and a quarter millions of acres; to Pennsylvania, two and a half millions of acres; and to Virginia, a half million of acres—making a total of four and a quarter millions of acres of land in addition to about one hundred and fifty thousand acres left out between the Onancock River and the Scarborough line on the Eastern shore."

See also Record, pages 252 to 262, inclusive. See also the report of Mr. Hubbard from the Committee on Public Lands to the House of Representatives of the Twenty-eighth Congress, First Session, accompanying bill H. R. No. 352, pages 192 to 245, inclusive, of the printed record in this cause, containing a great many historical facts bearing upon this question; which report it is said was written by Benjamin Watkins Lee, of Virginia. (See letter, page 191 of Record). See Rhode Island vs. Mass., 4 How. 634, as to the power of the King to decide such questions between the Colonies.

But, aside from the general power of the king in council, over these questions of territorial boundary, this particular decision between the Colony of Virginia and Lord Fairfax was binding upon Lord Baltimore, the proprietor of Maryland, because he had notice of the proceeding and was present, as is shown by Lord Calvert, his successor, in his letter of January 5th, 1754, to Governor Sharpe of Maryland. The letter is as follows:

London, January 5th 1754.

"My Lord approves of Yr. Endeavor with Lord Fairfax's in Virginia to fix the Branch of Potowmack River by another Branch run South West, it will enlarge & extend Maryland much more than the Branch run'g North West, & will Advantage Lord Fairfax as to his Particular Tract of Land. yet it will be very Difficult to gain the Colony of Virginia consent to resettle, as it will be the Losser by alterg the Course of the River, wh has been Settled by Order of the Crown, & *of wh the late Lord Baltimore had Notice & was present with Lord Fairfax at the hearing before the Council*, whose report the King Confirmed & Accordingly the Spring Head had been Determined by the Virginia Com-iss'rs *Ex parte* with Maryland Com-iss'rs Lord Baltimore Prayg Thom. Lord Fairfax & the Colony of Virginia's Chart of the Courses of the Rivers Rappahannock & Potomack the latter the fix'd Boundary South bet: Maryland & Virginia Accordg to the Order of the King and Council in 1736 & 1737. His Lordps desires you will obtain Mr. Cresapes opinion certain by observation of the North Temporary Line. His Majesty's Line by advice of his Council bet: Maryland & Pennsylvania of wh Line I Learn Mr. Cresap thinks is North of the highest Bend & Flow of Potomack River. If the Bend is over the Line the Pensilvanians will claim Water Passage to the Spring Head & on that River; it is of Consequence to know upon Settlg the North Temporary Line."

Also his letter of April 17th, 1754, in which he declines to have anything to do with the re-settlement of the course of the Potomac River, because he says that the Virginians and Lord Fairfax would probably oppose any re-settlement of the question, and, if they did oppose it, the crown would most likely side with them. The letter is as follows:

London, April 17th, 1754.

"By Lord Fairfax's Letter to you, his Lordship Declines having to Do with any Re-Settlement of the Course of Potowmack River. The Branch called the South Branch which you seem to apprehend will be much more Beneficial to Maryland, as in Length South Westward, will depend on Proof, as it's Fountain Head instead of the Spring Head of the said River, Determined by the Virginia Commissioners in 1736 and 1737. If the South Branch runs as you apprehend, it will certainly be of great Advantage to the encrease of Maryland, and also may be to Lord Fairfax's Tract of Land by the Spring head of Potomack lying more westward than the Determined Head of Potomack as above settled. However you ought before you make an Attempt, to be well Grounded How the Inclinations of the Governor, the Virginians and Lord Fairfax Stand, to a New Settlement of the Course and Fountain of Potomack with Maryland. *If they oppose, the Crown is most likely will side with them.* The Tryal of the South Branch of Potomack as to its advantages as may turn out, His Lordship is not against Mr. Cressap's Essay therein; Provided, he does not bring upon Him too great cost thereby, of which, if you find it absolutely necessary to send him, you must Bargain with him Reasonably." (Record Page 1305.)

Here then are positive admissions on the part of the proprietor of Maryland that Lord Baltimore, his predecessor, had notice of this hearing and was present, and he declines to engage in any effort to re-open the question because he is satisfied it would be unsuccessful. These letters were written in 1754, eight years after the matter had been settled. It is claimed in the answer of the State of Maryland in this cause and by her historical writers, that Frederick Lord Baltimore was not bound by the decision in this case, even if his predecessor did have notice thereof and was present at the hearing, because his predecessor only had a life estate and could not conclude those in remainder. But the foregoing letters from Lord Calvert, to Governor Sharpe, in 1754, show that he did not set up any such claim, but admitted virtually, that he was bound by the acts of his predecessor, and that unless the matter could be re-opened and a re-hearing obtained, he was bound by the decision and he was unwilling to make any attempt to re-open the matter because he was satisfied it would not be successful.

Mr. Faulkner, in his report to the Governor of Virginia in 1832, upon this question, says:

> "What were the precise limitations of those conveyances made by the proprietors of Maryland, and under which Frederick lord Baltimore denies the power of his predecessor to enter into any arrangement as to the boundaries, which could extend beyond his life estate. I am unable to say—my utmost researches have failed to furnish me with a copy of them—but they were so far satisfactory to his lordship's legal conceptions, as to induce him to resist even the execution of a decree pronounced by lord Hardwicke, in 1750, (1. Ves. sen., pp. 444-46) upon a written compact as to boundaries, which had been executed by his predecessor and the Penns, in 1732. To enforce submission to that decree, the Penns filed a bill of reviver in 1754, and after an ineffectual struggle of six years, lord Baltimore was compelled with a bad grace to submit, and abide by the arrangement as to the boundaries which had been made by his predecessor. To this circumstance, in all probability, was Lord Fairfax indebted for his exemption from the further demands of the proprietor of Maryland. For lord Frederick, no ways adverse to litigation, had by this time doubtless become satisfied that the power of his predecessor did extend beyond his life estate, and might even conclude those in remainder. Be that as it may, however, certain it is that the records of Maryland are silent upon the subject of this pretension, from September, 1753, until ten years subsequent to the compact between Virginia and Maryland in 1785.
>
> An opinion prevails among our most distinguished jurists, resting solely upon traditionary imformation, that about 1761, Frederick lord Baltimore presented a petition to the king and council, praying a revision of the adjustment made in 1745, which petition was rejected, or after a short time abandoned as hopeless. If there ever was such a proceeding, I can find nothing of it in the archives of Virginia.
>
> Be that as it may, it is certain that ever since 1745 lord Fairfax claimed and held, and the commonwealth of Virginia constantly to this day has claimed and held by the Cohongoroota, that is by the northern branch, as the Potomac, and whatever lord Baltimore or his heirs, and the state of Maryland may

> have claimed, she has held by the same boundary. There was no reason why lord Fairfax, being in actual possession, should have controverted the claim of Lord Baltimore, or Maryland. If Lord Baltimore, or Maryland, ever controverted the boundary, the question must, and either has been decided against them, or it must have been abandoned as hopeless. If they never controverted it, the omission to do so, can only be accounted for, upon the supposition that they knew it to be hopeless. If Maryland ever asserted the claim—seriously asserted it, I mean —it must have been before the revolution, or at least during it, when we all know, she was jealous enough of the extended territory of Virginia. The claim must have had its origin before the compact between the two states, of March 1785, (1 Rev. Code, ch. 18). We then held by the same boundary by which we now hold; we held to what we called and now call the Potomac; she then held to what we call the Potomac. Is it possible to doubt that this is the Potomac recognized by the compact? That compact is now forty-seven years old." (Record page 1295.)

From the time of this decision in 1745, to the present time, Virginia and West Virginia have held possession and exercised jurisdiction over all this territory. Virginia has granted all of it, by patents from her land office, to actual settlers, who have taken possession of the land and lived upon it for generations, exercising all of the rights of citizens of Virginia. She has created Counties and other political sub-divisions, large towns have grown up and the Federal Government has, in many ways, recognized it as territory belonging to the State of Virginia and West Virginia. On the other hand, the proprietors of Maryland, never, after that decision, attempted to make any grants or exercise any governmental jurisdiction or power of any kind within the territory South of the North Branch of the Potomac. So that it is apparent that all of the proprietors of the Colony of Maryland, prior to the Revolution, acquiesced in and accepted the decision of the king in council, establishing the North branch and the Fairfax stone as the boundaries and as a corner stone between her and Virginia, as final and binding upon her, and whatever claims have been made since the Revolution by the State of Maryland, no effort has been made to disturb the possession of Virginia and West Virginia until the bringing of this suit in 1891, except the suit, which was brought in this Court

by the State of Maryland against Virginia in 1834, but which was shortly afterwards dismissed and never renewed.

In addition to the copy of the map, which accompanied the report of the Commissioners, who surveyed out the Lord Fairfax's grant to the Northern Neck, and which is filed with defendant's answer, marked Exhibit B, (Record, page 362,) we call the Court's attention to the map of Fry and Pierre Jefferson, published in 1775, and which is filed with the answer marked "Exhibit F." On this map a line is drawn from the head of the North branch of the Potomac to the head of the Rappahannock, and is indicated by the words "Limitre au Lord Fairfax"; also the map filed with the answer, marked "Exhibit G," which was made to accompany Jefferson's notes on Virginia. On this map there is a line drawn from the head spring of the North branch to the head spring of the Rappahannock, marked "Lord Fairfax's line." On both of these maps the boundary lines of the State of Maryland are well defined just as they exist at the present day, running to the head spring of the North branch. We also invite the Court's attention to the journal of Thomas Lewis, one of the surveyors, who ran the line between the head spring of the Rappahannock and the head spring of the Potomac in 1746, under the direction of the King in council, found in the printed Record, pages 1952 to 1972, inclusive. The original memorandum book, in which this journal was kept, has been in the Lewis family until it was produced to counsel for the defendant, and is fully identified by the witness, Daniel Sheffey Lewis, a great grandson of Thomas Lewis, the surveyor. (See his testimony, pages 1943 to 1946 of the Record; also to the sketch or plat marked "J. K. Monroe Exhibit X", (Record, page 1950), on which Mr. Monroe, a surveyor, laid down the last few lines of the survey as contained in the journal of Mr. Thomas Lewis, above mentioned, from a point where they crossed the North branch of the Potomac to the end, at the Fairfax Stone, showing the manner in which the Commissioners arrived at the Fairfax Stone, at the time of the running of the first line through between the head springs of these streams. It is evident that according to the course run by them from the head of the Rappahannock River, North 43½ W, instead of striking the Fairfax Stone, they struck the Potomac River something like one thousand poles below the Stone. Then the journal says that they sought the Stone and finally found it. Then they ran these lines,

sketched by Mr. Monroe, so as to tie it to the line they had run from the head of the Rappahannock. The following is the account given by Mr. Lewis in his journal of the finding of the Stone:

"Running to our Right, we thought it was in probability a Branch of Potowmack md a Barch on the West Side the Same R. B. P. I. B. W. T. L. 75 & 1746—M.

884 poles through the Swamp

1014 pole another Swamp Begins

1054 poles a Large Creek Runs to the Right which we comcluded to be the Waters of Potowmack

1094 Totall for the Day & fare Side the Swamp. here we Encamp't as there was Some probability of this Being the main Branch of Potowmack thought proper to go no farther Before we had Satisfied ourSelves as to that point. We were Extremely hungary & Scarce had patience enough to forebear Snatching ye meat out of the pans Before half Done

Monday 20th Capt Winslo who was one of them that Surveyed up the River in 1736 Set off very Early in the morning with three other hands up the Creek in order to Discover whither this was the head of the River or not after we we Decamped And Removed about a mile to the Westward to get Better food for our horses. & there pitched our tents Sent Some hands to the N. W. ward to See what they Could Discover. Some others went a hunting & Killd Dear & Turkeys w'e proved a very Seasonable Relive to us our men yt was out a hunting heard Several guns which we supposed to be Indians

Tuesday 21 those sent to ye N. W. ward came Back about 9 o the Clock & Informed us that the Branches of Alleganey were not above four or five miles ahead of us & that there was but few & very Small Branches Between us & them

About 3 in the afternoon Capt Winslo Returned who had the good fortune to find the marked trees at the head Spring mentioned in their Jorunal of 1736 This peice of good news was So very agreeable it Seemed to Inspire every one with New life & Vigour & was then Resolved to Run a traverse to the Spring head from where we left off on Sunday night—

Accordingly Mr. Brook & I with the Chain Carriers Went to the place & from Thence West 400 poles to near our present Camp where we left off Being late. Continued this night in our old Camp—

The land or Soil on the N. W. Side the River is Black & very moist a great many Small Springs and Ouzey places & prety Stoney & hilley Exceding well timbered with Such as very Large Spruce pines great multitudes of Beach and Shugartrees Chery trees the most and finest I ever Saw Some three or four foot Diameter thirty or forty foot without a Branch. Some few oaks Chestnuts and Locusts tho' not many &c.

Wensday 22 Decamp'd very Early and Began where we left of the last night Thence

S 60 W 640 poles
N 60 W 127 poles
S 45 W 128 poles
S 20 E 80 poles
S 8 W 90 poles
S 16 E 92 poles
S 70 E 48 poles
East 26 poles
S. 71 E 31 poles
S 83 E 27 poles

S 80 E 6 poles to the Spring head where we found the Following old marks to (viz) a Spruce pine md R B. B W. I F. B L. F F. 1736 a Beach P. G. 1736 a Beech I S. & a Black a Beach W. Mayo two Beaches & two Spruce pines marked with three notches three way Each & one Large Spruce pine Blazed three ways—

We Dined on a Loyn Roasted Venison about three O'Clock at the Spring head. Drank his Majestys heal-h which

(A page has been torn out of the book at this point, so that we miss his account of the planting of the Stone no doubt.)

Thrusday 23.d Returned to the Spring where we made the Following marks (viz) a Beach mark, d G R on one Side and I X on the other Side on another Beach G. Fx. W. Beverly 1746 on one of the old notched Beeches Ld. F. X. on another Beach Fry. Lun. Lomax. P. Hedgman 1746. a Small Spruce pine for the Corner P I. on the Beech markd W. Mayo. is new marked T. Lewis 1746 on another Beech R. Brooke S. W. 1746 Iames Lyde on another Beach I Genn 1746. On the pine ole mark's R. B. is now mark,d T. B. a Small pine mark,d I A. 1746. another pine mark,d John Rain. G C. a Small Beech W. O. H. I L. 1746 I. H. on the Beach mark'd P. G., 1736

is marked WR 1746 P. I. 1746 & P. H. on another Beach WB WR 1746. y3 a Stone by the Corner pine mark'd FX on a Beech marked A. C." (Record pages 1961 to 1963.)

Then they corrected their bearing and reversed the line running S 46 E instead of N 3½ W.; by this corrected line they ran back to the head spring of the Rappahannock. He uses this language in his journal, page 1963:

"This Done we bid adue to the head Spring about ½ hour after nine O Clock Our Course Directing to the head of Rapahanock Being S 46 E— 30 pole the tope of the mountain in the Spring heads on
60 X a Spring runs to Right
138 pole a Branch Runs to ye left
320 poles a Beech md 1 mile
528 X a Branch Runs to Rt etc, etc.

We also call attention to the map which was made in accordance with the definitive treaty of peace which was concluded at Paris, February 10th, 1763, entitled "An Accurate Map of North America Describing and Distinguishing The British and Spanish Dominions on this Great Continent According to the Definitive Treaty Concluded at Paris 10th Feby., 1763. Also all the West India Islands Belonging to and Possessed by the Several European Princes and States. The Whole Laid Down According to the Latest and Most Authentick Improvements." This map is filed with the answer of the State of West Virginia, marked "Defendant's Exhibit P.," being the second map page 494 of Record. This map contains the following inscription on its face:

"The limits of His Majesty's several provinces are here laid down as they at present exercise their jurisdiction, but the limits of the Massachusetts Province with New York, New York with New Jersey, Connecticut with New York and Pennsylvania with Maryland are not yet fully determined, nor is the boundary of North or South Carolina yet settled, or of South Carolina and Georgia."

Nothng is said in this inscription about the boundary between Maryland and Virginia. That had been settled and the map shows those two provinces as they at that time exercised their jurisdiction.

The map shows the boundary of the Colony of Maryland running to the head spring of the North branch of the Potomac and the line extending down the North bank of the Potomac River to its mouth, rather than the South bank. Upon the question now under discussion the map is conclusive evidence that in 1763, at the time of the treaty, the authorities of Great Britain regarded the boundary line of Maryland as definitely settled and fixed at the head spring of the North branch of the Potomac. John Mitchell's map, made in 1755, the third map at page 494 of the Record, also shows the same boundary of Maryland running to the head spring of the North branch.

Fourth: We think it is clear from the facts and considerations above set forth that as an original proposition, the Court will conclude that the head of the North branch of the Potomac must be regarded as the first fountain or source of that River within the meaning of the charter granted to Lord Baltimore and within the meaning of the grant of the Northern Neck to Lord Fairfax, and that the Commissioners who were appointed to run out the latter grant, correctly located it as going to the head of the North branch, and that the king in council decided correctly in ratifying that location, and that if this were an open question, unaffected by any other considerations, this Court would come to the same conclusion.

Possession and Jurisdiction.

We have endeavored to show, and we think it is clear, that the matter has been *res adjudicata* since 1745 by the decision of the king in council rendered at that time, and that Lord Baltimore and his successors in title were, and are, bound by that decision. But if there is any doubt about these propositions, then it seems to us there can be no doubt but that the States of West Virginia's possession and jurisdiction and authority over this territory, exercised for a century and a half, will not be disturbed because this authority and jurisdiction has been exercised adversely, continuously, openly and notoriously during all those years. The Lord proprietors of Maryland, after the decision in 1745, took no steps to reopen the question either by a petition for a re-hearing or by an original proceeding on his own behalf against the Colony of Virginia for a settlement of the boundaries between the two Colonies, but clearly and emphatically declined to take any part in such a proceeding, so that for at least thirty years before the Revolution, the

Lord proprietors of Maryland acquiesced in that decision and in the claim of Virginia to hold to the Fairfax Stone. After the Revolution the legislature of Maryland, from time to time, passed resolutions asserting that the boundary was unsettled, but these resolutions related chiefly to the Southern boundary between the two States, rather than the Western boundary, and she several times appointed Commissioners for the settlement of these boundary questions, but the State of Virginia persistently refused to appoint Commissioners unless it were conceded by the State of Maryland that the Western boundary should begin at the Fairfax Stone, and, so far as we have found, every act or resolution adopted by the Legislature of Virginia upon this question took this position. The first definite action taken by the States of Maryland and Virginia toward the settlement of Maryland's contention about the Western boundary, seems to be the Maryland Act of 1818. (Record, page 1317), in which it is provided that the Governor shall appoint three Commissioners "to meet such Commissioners as may be appointed for the same purpose by the Commonwealth of Virginia to settle and adjust, by mutual compact between the two governments, the Western limits of this State and the dividing line and boundary between this State and the Commonwealth of Virginia, *to commence at the most Western source of the North branch of the Potomac River* and to run a due North course to intersect the line between this State and the State of Pennsylvania, etc." The corresponding Virginia Act was passed February 28th, 1822, (Record, page 1319). It provides "that the Governor shall appoint three Commissioners to meet such Commissioners as may be appointed for the same purpose by the Commonwealth of Maryland to settle and adjust, by mutual compact between the two governments, the Western limits of this State and the dividing and boundary line between this State and the Commonwealth of Maryland: to commence at Fairfax's Stone on the head waters of the North branch of the Potomack River and run a due North course to intersect the line between this State and the State of Pennsylvania, etc."

Maryland passed an act in 1825 (Record, page 1320), for the appointment of Commissioners to settle the Western boundary without designating where they should begin, but providing that the Governor of Delaware should act as umpire. These Commissioners were to act with such Commissioners as might be appointed by the

Commonwealth of Virginia. Virginia passed an act in 1832 (Record, page 1322), again authorizing the appointment of three Commissioners to meet such Commissioners as might be appointed by Maryland, and providing that they should commence at the Fairfax Stone, or at the first fountain of the Cohongoroota, or North branch of the Potomac River, and run a due North course, etc.; providing further that, in case Maryland should fail to appoint Commissioners, then the Virginia Commissioners should run and mark the line according to the modifications of the bill. And at the same session. the legislature authorized the Governor to procure an authenticated copy of the record of a decision made sometime anterior to the American Revolution, before his Majesty, George II, late King of Great Britain, France and Ireland, in a case which was brought before his Majesty in council by the late Proprietor of the Northern Neck of Virginia and the late Proprietor of the Western domain of Maryland, in a dispute and controversy touching the limits and boundaries of the several letters patent granted by their late Majesties King Charles II and King James II for land lying on both sides of the River Quoriough or Potomac, and also other information in relation to the settlement and adjustment of the Western boundary of Maryland, which, in his opinion, ought to be perpetual. It was under this resolution that Honorable Charles J. Faulkner was appointed and made his report. And thereupon Maryland, in 1834, directed her Attorney-General to bring suit in the Supreme Court of the United States for the settlement of this question. This suit was brought and subsequently dismissed. Maryland never again asserted her right to go to the head spring of the South branch of the Potomac, but from 1835 to the present time she has abandoned any such claim and has acquiesced in the North branch of the Potomac as the true boundary line between the States. She has not only acquiesced in the North branch of the Potomac being the true boundary line, but she has acquiesced in the Fairfax Stone as standing at the head spring of the North branch, and as constituting the corner stone of her territory, until Mr. W. McCulloch Brown, the second surveyor appointed on behalf of the State of Maryland in this cause, attempted to set up another point as the head spring of the North branch, which he, himself, is alone responsible for, and which he has called the Potomac spring, but which we have called Brown's Spring, because he is the dis-

coverer thereof. This acquiescence of Maryland is shown by her act of 1852, (Record, page 1360) which contains this recital:

> "Whereas it is of great importance that the Western territorial limits of the State of Maryland be clearly defined and her boundaries permanently established, and whereas the true location of the Western line of Maryland between the States of Maryland and Virginia, beginning at or near the Fairfax Stone on the North branch of the Potomac River, at or near its source, and running in a due line to the State line of Pennsylvania, is now lost and unknown, and all the marks have been destroyed by time or otherwise, and whereas the States of Virginia and Maryland have both granted patents to the same tracts of land at or near the supposed line, and as suits of ejectment are now pending in the Circuit Court for Alleghany County, in the State of Maryland, by persons holding under Maryland patents against persons now in possession and holding land under patents granted by the State of Virginia, which cannot be justly settled without establising said boundary line,"

therefore providing that the Governor shall open correspondence with the Governor of Virginia in tracing, establishing and marking said line, and, in case Virginia appointed a Commissioner, authorizing the Governor of Maryland also to appoint a Commissioner, "Who shall cause the said line to be accurately surveyed, traced and marked with suitable monuments, beginning therefore at the Fairfax Stone and running thence due North to the State of Pennsylvania."

Just before the passage of this Act, the people of Maryland had adopted a new constitution in 1851, Article 8, Section 2 of which constitution distinctly recognizes the North branch of the Potomac River as the boundary line, and the Fairfax Stone as the corner of her territory bounding on the State of West Virginia. It provides for the creation of a new county, near that part of Alleghany County, lying South and West of a line beginning at the summit of Big Backbone or Savage Mountain, where that mountain is crossed by Mason and Dixon's line, and running thence by a straight line to the middle of Savage River, where it empties into the Potomac River, thence by a straight line to the nearest point or boundary of the State of Virginia, thence with said boundary to the Fairfax

Stone. And this new county was formed as Garrett County, in 1872, its boundary lines being described just as they were to be as set forth in the constitution of 1851. (Record, pages 60 and 61 and 1363 and 1364.) After this yielding of her ancient contention on the part of the State of Maryland, and acceding to the persistent demand and requirement of the State of Virginia that the boundary line should begin at the Fairfax Stone, and after, by her Act of 1852, she had simply asked, not that a new line be establised, but that the old line should be retraced and remarked, Virginia, in 1854, passed an act providing for the appointment of a Commissioner to act in conjunction with the Commissioner of Maryland to run and mark said line. The language of the preamble is as follows:

> "Chap. 1. An Act for Running and Marking the Boundary Line Between the States of Virginia and Maryland.
>
> Passed March 3, 1854.
>
> Whereas the general assembly of Maryland has passed an act for running and marking the boundary line between that state and the state of Virginia, beginning therefore at the Fairfax Stone on the Potomac river, sometimes called the North branch of the Potomac river, at or near its source, and running thence due north to the line of the state of Pennsylvania; and whereas the legislature of the state of Maryland has requested the appointment of a commissioner on the part of this state to act in conjunction with the commissioner of Maryland to run and mark the said line; therefore,
>
> 1. Be it enacted by the general assembly, that the governor be and he is hereby authorized and required to appoint a commissioner, who, together with the commissioner who may be appointed on the part of Maryland, shall cause the said line to be accurately surveyed, traced and marked with suitable monuments, beginning therefor at the said Fairfax Stone, situated as aforesaid, and running thence due north to the line of the state of Pennsylvania.
>
> 2. It shall be the duty of the commissioners, after running, locating, establishing and marking the said line, to make a report, setting forth all the facts touching the same, and to forward copies of the joint report to their respective legislatures. And upon the ratification of such report by the legislatures of the

states of Virginia and Maryland, the said boundary line shall be fixed and established, to remain forever, unless changed by mutual consent of the said states.

3. This shall be in force from its passage." (Record, pages 1361 and 1362.)

Afterwards by her act of 1860, (Record, page 1362,) Maryland by her legislature, solemnly established the line running from the Fairfax Stone to the Pennsylvania line as surveyed in the year 1859 by the Commissioners appointed by the States of Maryland and Virginia, as the Northwestern line of the State; and afterwards the line was marked under the authority of the State of Maryland, notwithstanding Virginia had failed to adopt the line, or concur in marking it. Mr. Lee, the Commissioner of Maryland, was appointed to retrace this line from the Fairfax Stone. In his letter to Mr. Angus McDonald, dated May 8th, 1860, says:

> "In the Act of 1852 in relation to retracing and marking her Western line, Maryland yielded, as she has unfortunately too often done, the point at issue between the Commissioners of 1818 etc." (Record, page 437 to near bottom of page 438.)

The various ways in which the State of Maryland has recognized the North branch of the Potomac as her boundary line are set forth in the answer. These show that she has repeatedly recognized it through her legislature in granting the charter to the Piedmont & Cumberland Railway Company, by authorizing the printing of Martenet's map, which makes the North branch the boundary line between the States and runs the meridian line from the Fairfax Stone to the Pennsylvania line; her County authorities, by building bridges in conjunction with the West Virginia authorities across the North branch, by her Governors in acknowledging and acting upon requisitions issued by the Governor of West Virginia, for parties who had committed crimes in this territory between the North and South branches of the Potomac, and, in fact, by the very act by which this suit was authorized to be brought; the direction being that the suit should be brought to fix and determine the true location of that portion of the boundary line between the States, lying between Garrett County, Maryland, and Preston County, West Virginia.

All these facts show the adverse, hostile, continuous possession of the Colony by the State of Virginia and the State of West Virginia of all this territory up to the present time and show that whilst Lord Baltimore feebly protested that a mistake had been made in running the Potomac River, he acquiesced in and recognized the finality of the decision and the jurisdiction of the Colony of Virginia over this territory, and whilst the State of Maryland, prior to 1818, set up a claim that a mistake had been made in adopting the North branch as the line, yet, after that date, she has recognized the North branch and the Fairfax Stone as the boundary line and abondoned all claim to go to the head spring of the South branch, and did not really intend, when she authorized this suit to be brought, to raise the old question.

In the meantime, in this territory the States of Virginia and West Virginia have erected county governments, protected their citizens, built roads, school houses, railroads, court houses, and built public buildings, established and maintained their courts of justice, their system of public schools, elected their representatives and senators in Congress, and this large territory has become thickly populated to a very considerable extent, large towns have grown up, and all the people living in the territory have been recognized as Virginians before the War, and as West Virginians since the War, and have held allegiance to those States. Meantime, in 1863, the State of West Virginia was created, her State line going across the South branch of the Potomac, leaving its source in Highland County, Virginia. The creation of the State of West Virginia was approved and ratified by the Congress of the United States, and no opposition was made to it by the State of Maryland or her representatives in Congress, and if they are now permitted to establish their claim to go to the head spring of the North branch, they dismember the State of West Virginia, which was created with their acquiescence and by a government to whose authority they are subject in such matters. The act of Congress for the admission of West Virginia was passed in 1862, which is found on page 1379 of the printed Record, and it provides that the State shall embrace certain named counties, among others, the counties of Pendleton, Hardy and Hampshire. At that time the counties of Grant and Mineral had not been created. Grant was afterwards created out of the Western part of Hardy County, and lies entirely within this claim of the State of Maryland, and Min-

eral was created out of the Western part of Hampshire, and also lies wholly in said territory. Hardy County at that time extended to the Fairfax Stone, and Hampshire to the North branch of the Potomac. The South branch of the Potomac extends through Pendleton County into Highland County, which latter county was left in the State of Virginia. We submit that by the creation of the State of West Virginia, as above set out, with the approval and ratification by the Congress of the United States, without objection or protest from the representatives of Maryland, the latter State is estopped now to deny that the State of West Virginia includes the boundaries set out in said act of Congress.

We submit therefore that by this estoppel and by the doctrine of laches and adverse possession, which is applicable in controversies between the States in relation to their boundaries, as frequently decided by this Honorable Court, the State of Maryland cannot recover in this case this territory between the North and South branches of the Potomac even if the Court should be of opinion that, as an original proposition, the charter of Maryland could be construed to embrace said territory, which we have endeavored to show is not true.

Fairfax Stone the Source of the Potomac.

Having shown, as we think, that the North branch of the Potomac is the true boundary line between the States of Maryland and Virginia, rather than the South branch, and that the State of West Virginia should not be disturbed in her possession and jurisdiction over the territory lying South of the North branch, the next question to be determined in this case is what point shall be accepted as the head spring or source of the North branch of the Potomac and as constituting the point from which the meridian line is to be run to the Pennsylvania line or to the fortieth degree of latitude mentioned in the charter of Maryland.

In discussing the question as to whether the first fountain of the Potomac River is to be found at the head of the North or the South branch, we have given the facts which led to the location and planting of the Fairfax Stone at the head of the North branch in the year 1746. We have shown that by reason of the controversy between Lord Fairfax and the Virginia Colony as to the boundaries of his grant of the Northern Neck, the king in council had the Potomac River surveyed with great care and at great

expense and by the most reliable and competent engineers and Commissioners then obtainable. This survey was made in 1736. These surveyors were obliged to select some point as the head spring of the river. We have shown that they took measurements and observations at the mouth of the South branch and determined that the North branch was the main river. Passing on up the North branch, when they came near to the head at the foot of the Backbone Mountain they found the river branching off into three prongs, and it was necessary for them to determine which one of those prongs constituted the main river, so that they could locate the source of the river at the head of the prong selected. We must assume that they exercised the same care and judgment and discretion in determining which one of these prongs should be adopted as they did in deciding between the North and South branches. They selected the middle prong rather than the most Eastern or the most Western prong. They followed this middle prong to its source, although it made a complete curve, and at its source they marked a number of trees with their initials and with the letters FX. We have not access now to the original report of this survey, which was obtained and filed with the report of Mr. Faulkner in 1832, but, fortunately, we have the original note book of Mr. Thomas Lewis, the surveyor who, ten years later, in 1746, after the decision of the king, ran the line between the head spring of the Rappahannock and the Potomac, and this note book shows, beyond all question, that it was this middle prong of the stream which was adopted, and it was here that the Commissioners, in 1746, planted the Fairfax Stone, which has been recognized as a monument of boundary from that day to this—one of the oldest land marks in the United States. Virginia has claimed the right to go to that stone from that day to this. She has granted the lands to that Stone and to the meridian line running from that Stone Northward. Her county lines have called for that stone. The patents from her land office make it a point in their boundaries and the State of Maryland has, by the acts of her legislature, by the language of her constitution of 1851, by the creation of Garrett County, and in various ways recognized this Stone also as a point in her boundary, and we respectfully submit that all the observations, which have heretofore been made in this brief with reference to the binding character of the decision of the king in council, as between the North and South branch, and

with reference to the long continued possession and exercise of jurisdiction by the Colony and the State of Virginia and by the State of West Virginia, and of the acquiescence and recognition on the part of the State of Maryland and the estoppel as against the State of Maryland growing out of the creation of the State of West Virginia, and the approval of her boundaries and territory by the act of Congress admitting her to the Union, apply with as much force and as conclusively to the Fairfax Stone as a point in the boundary as to the North branch of the Potomac, as the boundary line. And we submit that as the North branch has been shown to be the true boundary line, by the same arguments and considerations the Fairfax Stone is shown to be the source of that branch and point from which the boundary lines run, and that the same considerations which will prevent the Court, as we believe, from disturbing the North branch as the boundary line, will also prevent it from adopting any other source of the North branch than the Fairfax Stone as the head spring or first fountain to which the boundary line shall run, even if at this time there were any serious doubts as to its having been properly located originally.

Fairfax Stone Properly Located as Head of Potomac.

But we most confidently submit that the evidence in this case shows that the Commissioners selected the proper prong of the river and correctly located the Fairfax Stone at the real and true source of the North branch. At least the prong at the head of which it is located has as strong a claim to be considered the main prong or stream as either of the other prongs into which the river divides itself near its source.

The facts show that the North branch of the Potomac has no great spring or well defined source which could be selected without any chance of difference of opinion, as some rivers have. It rises in a succession of ridges at the foot of the great Backbone Mountain in little streams, rivulets and springs, which gradually unite to form the river, and there is no such definite and positive criterion as that it can be definitely said that any one of the prongs, rivulets or springs constitute its source or first fountain. Either one of the three prongs might be selected with almost equal propriety, and, when selected, no good reason can be given for changing from that selection to either of the others, especially

where one hundred and fifty years have elapsed, rights have been acquired and the selection of any other point would disturb conditions and property rights which have grown up and existed upon the faith of the first selection. In order to justify any change from the point selected by the Commissioners in 1746, from the point which has been recognized and held to, as above mentioned, the arguments and reasons adduced must be of the clearest and most indisputable character. Such a change cannot be made if there can be any doubt as to whether the question was correctly decided in the first place. Although the Court may feel that it would probably have decided the question otherwise originally, yet it will not now reverse the decision or change the status unless it is so absolutely clear that reasonable men cannot differ about it.

Of course it is impossible for us to transport ourselves back to the year 1746 and ascertain what was the exact condition of the prongs and head springs of the North branch of the Potomac at that date. Time changes everything. The subterranean springs, the surface drainage and the forests frequently change in the lapse of time, so that streams, which were large and strong one hundred years ago, may be dry today. Springs, which sent forth large volumes of water in 1746 may now send forth a feeble stream by reason of climatic, geologic and other changes. Therefore if we should find that one of the prongs is now larger or heads farther West, or, if the spring at its source, is perpetual whilst that at the Fairfax Stone may at times go dry, we could not, from this, assume that these conditions existed in 1746, and they would not justify a change of the location of the boundary stone at this day.

But fortunately the evidence in this case shows that the correct prong of the branch was selected; that it is, if anything, longer and larger than the Western most branch which Mr. W. McCulloh Brown has set up as the claim of Maryland in this case. We invite the Court's attention to the evidence upon this point as follows:

Evidence for the Plaintiff.

By reference to the map of W. McCulloh Brown filed in this cause, it will be seen that he has laid down the main Potomac River, showing the South prong before we reach the meridian of

the Fairfax Stone going up stream, and, after passing the meridian of the Fairfax Stone, he shows the two other prongs—one leading in a semicircle to the Fairfax Stone and the other running Northwestward to what he has designated as Potomac Spring.

Mr. W. McCulloh Brown's Partisanship.

Mr. Brown has so far forgot the position which he occupied as a mere surveyor, who is supposed to act impartially and without reference to the interests of either side and has undertaken to make out a case for the State of Maryland. He has, of his own motion, adopted a certain nomenclature. He calls a spring, which he found near the foot of the Backbone Mountain, Potomac Spring. He calls that branch of the river, Potomac River, and he has, with characteristic partisanship and unfairness, designated the stream, which runs to the Fairfax Stone, as Fairfax Run, endeavoring to make it a mere run and as contemptible as possible. These names are manufactured by Mr. Brown himself. He alone is responsible for them. In order that the Court may not be misled by Mr. Brown's map and by the system of names which he has placed on it, we desire to direct the attention of the Court to the evidence upon this question of the names, and also to show the extreme partisanship of Mr. Brown in this case: for instance, in attempting to get the length of the two prongs, the one running to the Fairfax Stone and the other to what he calls the Potomac Spring, instead of measuring in the middle of the stream of the branch that leads to the Fairfax Stone, he measured on the inside of the curve so as to make it as short as possible. In measuring the other stream leading to the Potomac stream he measured the outside of the curve. On cross-examination (pages 1043 to 1045) he testifies as follows:

> "Q: Now what was the first work you did?
>
> A. The first work which I did was to run north from the Fairfax Meridian to the point where the Meridian from the Fairfax Stone crossed the North branch of the Potomac River. I then ran from that station up the right bank of the River to a point where the River forked, which was designated and known as station 31. From that point I continued up the right bank of the stream on the left, to the Fairfax Stone and to springs near it, to that point; I then returned to the fork of the River at Station

31, and ran up the right bank of the stream to a point which is marked as station 97, and by a stone with the work Potomac 1897 upon it, this point being near the summit of the Back Bone Mountain.

Q. Then your first work was to run the north line from the Fairfax Stone till you crossed the River, then followed the River up to its forks and station; you surveyed the two forks?

A. Surveyed the two forks.

Q. In surveying the two branches, you stated you went up the right hand bank, which do you call the right hand bank?

A. The right hand bank is the one starting from the source of the stream, which is on the right going down the stream.

Q. Right hand, going down?

A. *Right hand, going down?*

A. Right hand going down.

Q. Not the right hand going up?

A. I did not mean to say the right hand bank; I should say the right bank, not the right hand bank.

Q. By the right bank you mean the bank to your right hand as you go down stream?

A. Yes sir.

Q. That would be the south side of the River, where the Meridian crosses, would it?

A. Yes sir.

Q. It would be on the inside of the curve, wouldn't it, running from that point around to Fairfax Stone?

A. Well, yes.

Q. On the other branch it would be on the outside of the curve, wouldn't it?

A. It would.

Q. Was there any difficulty in measuring the stream leading to the Fairfax Stone, in the middle of the stream at that time, instead of the right bank, as you call it?

A. I did not wish to measure it in the middle of the stream. You would have gotten wet.

A. I asked you if there was any difficulty in measuring it in the middle of the stream?

A. You would get your feet wet.

A. It could be done?

A. It could be done, yes.

Q. You didn't do it?

A. I did not want to do it.

Q: Why did you not want to do it?

A. Because the State of Maryland claims to the southeast bank of the stream, the furthermost bank to the Mason & Dixon Line. I wanted to locate the claim in relation to the North Branch upon the southern bank.

Q. Because the State of Maryland claims to that bank, that is the reason?

A. They do claim on the north branch to the southern bank.

Q. Well the State of Maryland don't claim anything on that part of the River running from the forks at 31 to Fairfax Stone?

Objection by Plaintiff—witness has no authority to state what the State of Maryland claims.

A. The State of Maryland claims to the north fork of the southern branch, the head waters of the north branch, which I know lies to the west of that point; therefore I know they do claim that portion within that curve.

Q. Then you were mistaken when you said she claimed to the south side of the North Branch?

A. Claims the whole thing.

Q. She claims everything?

A. She claims everything.

Q. Well, now, Mr. Brown, were you locating claims of the State of Maryland, or were you attempting to run the stream of the North Branch at the time you made that survey?

A. When I made that survey, I was instructed to run down the further or southern bank of the North Branch of the Potomac River.

Q. You said while ago that you did it because you did not want to run the other bank and that you did not want to do it because the State of Maryland wanted to the south side?

A. The instruction was to run to the further or southern bank, the right hand bank of that stream.

Q. Well, whatever the motive, that side of the stream is shorter, is it not, than if you had run on what is called the left side of the stream, the left bank of the stream?

A. From Station 31 the curve would make that somewhat shorter.

Q. And somewhat shorter than if it were run in the middle of the stream?

A. It would, yes."

With reference to the name, Potomac Stream, he testifies as follows on pages 1048 to 1049:

"Q. You found no monument or marked trees at or in the neighborhood of what you call Potomac Spring, did you, when you went there?

A. Not when we first went there.

Q. There was nothing to indicate that that had ever been marked or established as a corner, or point in the State boundary, was there?

A. I found nothing.

Q. You did not find that it was a point in any surveys of any kind, did you?

A. It was not, to my knowledge.

Q. Did it have any name before you went there?

A. I heard no name,

Q. Sir?

A. I heard no name.

Q. Did you inquire as to whether it had a name?

A. No. I didn't,

Q. You named it Potomac Spring, did you?

A. Marked a stone there with the word Potomac on it.

Q. But you have it marked Potomac Spring on the map?

A. I named it Potomac Spring.

Q. You adopted that name?

A. I did. I had heard of the spring before, I was told that the spring existed, and that it was on the mountain at that point.

Q. You hadn't heard that it was known in that neighborhood as the red spring?

A. No, I did not.

Q. And you didn't inquire, amongst the people there to find out if it had a name or not?

A. Not as to any specific name; they all knew the spring.

Q. I notice on your map you have the word Potomac along the branch leading to what you call the Potomac Spring, and the word River just below Station 31. Do you intend by that to put those two words together and indicate that that branch is the Potomac River?

A. That is the North Fork of the Potomac River, yes sir.

Q. Why did you not call it the North Fork of the Potomac River?

A. There is no room to get the lettering in on the map very well.

Q. I notice you have the words Fairfax Run on the stream leading from Station 31 to Fairfax Stone; where did you get that name?

A. It is customary to call most of the small streams runs in this country, and that leading to Fairfax Stone is designated Fairfax Run, in distinction from the other branch.

Q. That was your own name, was it not?

A. That was my own name, yes.

Q. Why did you not call the stream running to Potomac Stone Potomac Run?

A. Our claim was that it was the north fork of the North Branch of the Potomac River.

Q. You were giving names and you stated it was customary to call the small streams runs. You had called the other branch Fairfax Run, why did you not call that Potomac Run?

A. Because we located that stream as the western source of the North Branch of the Potomac River.

Q. You did it because you wanted to show the claim of the State of Maryland that that was the Potomac River?

A. That it was the north fork of the Potomac River.

Q. And you selected the name Potomac for that spring for the same reason, did you not?

A. We did, yes sir.

Q. You otherwise might have called it Brown's Spring, might you not, wouldn't that have been more natural, as you were the discoverer, to call it after yourself?

A. I was not the discoverer.

Q. It hadn't any name until you got there?

A. No name that I know of.

Q. You call the line Brown & Bauer line?

A. Call it the Potomac Meridian.

From this Potomac Spring they ran what he calls the Potomac meridian, and so designates it on his map. As to the purpose in running this meridian line and marking it with great care and at very great expense with stones, hubs and bench marks, Mr. Brown testifies as follows: (Pages 1050 to 1051),

"Q. In running this Meridian, between those points, what was your purpose?

A. The purpose was to define the line more clearly upon the ground and to locate the streams, roads, land tracts, and other objects upon the ground; the contour of the country.

Q. You were not attempting to retrace or locate any old line that had been run along there, were you?

A. With the Potomac Meridian?

Q. Yes.

A. The object was to lay down actually upon the ground a Meridian Line north from the North Branch of the Potomac River to the Mason and Dixon Line.

Q. Well, you were not attempting to trace out any old line that had ever been run there before, were you?

A. There were no marks of any old line ever having been run there.

Q. That does not exactly answer my question, Were you attempting to trace out any old line that had ever been run there before, was that your purpose?

A. No, we were not.

Q. You had never heard of any line ever having been run there before, had you?

A. I had not.

Q. You didn't find any marks of trees, monuments. or other indications of any such line?

A. No.

Q. Was it your idea to establish this as the western boundary line of the State?

A. Dr. Bauer and myself were simply obeying the instructions of Counsel for the State of Maryland.

Q. Did counsel instruct you to run that line as you did, and mark it as you did?

A. Yes.

Q. Has it been your custom when acting as a surveyor under order of court to put down permanent monuments upon a line that is then run for the first time under the direction of counsel?

Q. It is my custom to mark everything, as far as possible, with a permanent mark, land surveyed, or anything else. These marks, as I say, were sub-surface marks; no stranger could find them; it would take a reference to my notes to reproduce these lines in almost all places. There is one stone at Potomac Spring that is easily seen.

Q. You have frequently done surveying under orders of Court, have you not?

A. Well, yes sir.

Q. The object of such surveying is to ascertain what is on the ground, is it not rather than to make new lines?

A. Well, I cannot answer that question.

Q. The only authority you had for making a new line from that spring to the Pennsylvania Line was the direction from the Counsel for the State of Maryland?

Plaintiff objects.

A. That was my authority.

Q. It was not necessary to run and mark that line as you did in order to locate the Michler line, was it?

A. No, it was not.

Q. You could have run a straight Meridian Line from the Fairfax Stone to the Pennsylvania Line and determined whether the Michler Line was a straight Meridian or not, without running any other lines from any other point?

A. We could, yes sir."

The stipulation and agreement between the counsel for Maryland and West Virginia was that a surveyor should be selected by each State, and when the State of Maryland directed surveying to be done, it should be done by the surveyor selected by her, the other surveyor accompanying and making suggestions and having any work done that he might think proper; and when the State of West Virginia desired any surveying done, it should be carried out by the surveyor appointed by her in the same manner, and then the two should prepare a joint map and report so far as they could agree, but, in case they could not agree, then they should make separate reports and maps. Mr. Brown made no effort to confer with Mr. Monroe, the surveyor of the State of West Virginia, or to make up a joint report and map with him, but proceeded in his own way and made up his map and report with the names above mentioned upon it, without attempting to get the concurrence of Mr. Monroe. His testimony upon this point is found on pages 1080 to 1081:

"Q. Your report and map have been prepared without consultation with Mr. Monroe, the surveyor representing the State of West Virginia, who accompanied you on the survey, have they not?

A. We consulted as to the scale of the map, Mr.

Monroe at first wanting a smaller scale then it would be necessary to show the lines which the State of Maryland wishes to put upon the map.

Q. But as to the matter upon the map, you have made that without conferring with him; he has taken no part in the preparation of the map?

A. I put upon the map what work I had done under the direction for the counsel for the State of Maryland; I put nothing else upon the map.

Q. I understand that, but my question is whether Mr. Monroe was consulted or had anything to do with the making of that map?

A. He did not, not with the making of that particular map.

Q. And that is true, also, as to the report which you have prepared, so far as it is prepared?

A. Yes, sir.

Q. He has not been asked to assist or confer with you in the preparation of that report?

A. Not in the report.

Q. Was it your expectation to submit this map and report to Mr. Monroe for his examination or suggestion before you returned it to Court, or did you expect to return it on your own responsibility?

A. Not on my own responsibility at all; the map was prepared under the direction of the counsel for the State of Maryland and what ever they see fit to do would be done in the matter.

Q. Wasn't you aware that the agreement between counsel was that the two surveyors should confer and agree on the maps *and agree on the maps* and reports, and if they could not agree, make separate maps and reports; were you aware that was the agreement between counsel?

A. Well, I understood, without any personal misunderstanding, that he wanted a smaller scale, and I was satisfied that would not answer for our work at all, and it was necessary for me to work upon the map and report, and therefore I had nothing left to do but to go ahead with the scale I saw fit to adopt for the State of Maryland.

Q. Did you understand Mr. Monroe was making an issue with you on the scale of the map, would not agree to your map because you adopted a different scale from what he thought was proper; do you want to convey that impression?

A. That was my understanding that the confession

which you mention in regard to the maps virtually gave permission to the other State to prepare such maps as they thought was best to present their case, and when I did confer with Mr. Monroe as we had differed on the scale and I had no notes or knowledge of the different work he had done on the part of West Virginia, I had no means of putting his work upon the map. Therefore there was nothing left for me to do but to make a map myself. I might state that the volume of work which is covered by this case would make one map almost impossible to comprehend or understand."

The foregoing testimony of Mr. Brown has been cited in order that the Court may understand the attitude which he assumed toward the case, and that his work and testimony is necessarily colored in favor of the party whom he so ardently represents. We think, on the other hand, it will be found that Mr. Monroe, the surveyor appointed by the State of West Virginia, has understood all through the case that he was expected only to do such surveying as he was directed and to report facts and not endeavor to make a case for the State of West Virginia.

Maryland Charter Does Not Call for Most Western Source.

Mr. Brown undertook, first, to show that the branch or prong leading to the Fairfax Stone was not as long or as large a stream as that branch leading to his Potomac spring; and, second, that the Potomac spring was further West and rose at a higher altitude. We do not see that the fact that it was further West, or that it has a higher altitude cuts any figure in determining whether it constitutes the first fountain or source of the Potomac. The charter of Maryland does not call for the most Western source of the Potomac, nor for the spring rising upon the highest ground, but simply for the first fountain, meaning the head spring of the river, whether it is North, South, East or West, or whether it rises upon high or low ground.

Mr. Brown's Partizan Report.

In this connection we also desire to call the Court's attention to the report filed by Mr. W. McCulloh Brown of his work as surveyor in this cause. This is the most extraordinary report of a survey that we have ever seen. In the course of a practice extending

through many years, involving the trial of ejectment and other cases, in which land titles were involved, and where surveys were made under the orders of Court for the purpose of determining locations of grants and other similar purposes, we have never known a surveyor to undertake to decide in his report the main fact in issue in the cause and to argue it with partisan zeal from the standpoint of one of the contestants, and, yet it is apparent from this report of Mr. Brown that this has been his whole effort. His report, instead of merely laying before the Court the facts ascertained by him upon the ground, undertakes to interpret those facts and to make elaborate arguments from them and solemnly to decide that what he calls the Potomac stream is the first fountain of the Potomac. We do not think this report ought to have been permitted to be filed. We think it is a breach of the privileges of a surveyor to make a report like this. We would move to strike it from the files of the case, but as this is a matter to be tried by the Court and not by a jury, the Court will not be influenced by these matters, but will take only the facts as reported by Mr. Brown and Mr. Monroe, the two surveyors, and consider the arguments advanced by counsel on either side, and reach its own conclusion. We cannot refrain, however, from calling the Court's attention to some of the language of Mr. Brown in this report. His report is found in the printed Record, pages 901 to 978, both inclusive. On page 906, after giving an account of his running of the branch leading to the Fairfax Stone, he says: "I thus proved that some spring, other than those at Fairfax Stone, was the most Westerly source of the Potomac River," and then he says:

> "I then, by direction of Counsel for the State of Maryland, returned to 'Station No. 31', as above located, and ran, by actual survey, the Northern branch of the Potomac river, the location of which was made by running up the Southern or right hand bank thereof, as designated from its source in order to locate and determine the most Western source, or 'First Fountain' of the Potomac river."

It is seen here that Mr. Brown assumes that the first fountain necessarily means the most Western source. He then sets out, by courses and distances, his survey of this Northern branch, and, on page 908, he winds up with this language:

"At the end of 87 feet on this line is a spring, 10 feet to the left, and at the end of 110 feet is a spring 15 feet to the left, thence,
97th. 54 degrees 07′ West, 130 feet, to 'THE FIRST FOUNTAIN OF THE POTOMAC RIVER.' and at a distance of 6477.7 feet from the 'Forks', at 'Station No. 31', on the plats."

On page 909 he uses this language:

"I then by direction of Counsel for the State of Maryland, determined from the above locations and the data thereon, that the 'First Fountain of the Potomac River' as above located and designated, is, by latitude and departure thus obtained, 7220.99 feet North, and 5978.56 feet West of the 'Fairfax Stone'. and also that no other spring or fountain of said river is so far west.

I then, by direction of Counsel for the State of Maryland, planted a large square rock 12x12 inches, and 3½ feet long, projecting 4 inches above the surface of the ground, precisely 11 feet due North of the waters of the 'FIRST FOUNTAIN OF THE POTOMAC RIVER,' the stone being so planted because the spring is in a small ravine.

I also planted near said stone a flat slab 3x20 inches 3½ feet long, upon which was cut the word and figures, 'Potomac, 1897.'

The 'FIRST FOUNTAIN OF THE POTOMAC RIVER' is designated upon the plats by the words 'Potomac Stone', and the Northern branch of the Potomac river as above located and returned, is shown upon the plats by solid blue lines from mouth of Laurel run to 'Station O' and from thence to 'Potomac Stone' and is designated 'Potomac river'; the other streams flowing into it are shown upon the plats by solid blue lines.

I further certify and return, that the 'FIRST FOUNTAIN OF THE POTOMAC RIVER', shown upon the plats at 'Potomac Stone' is within a short distance of the top of the Backbone or Great Savage Mountain, and that upon the opposite or west face of the mountain is a spring, one of the fountain heads of 'Lead Mine Run,' a tributary of the Cheat river, flowing in a westerly course, and that by direction of Counsel for the State of Maryland, I located, by actual survey, the said spring, and a portion of the stream

issuing therefrom, in order to illustrate its course, as follows, to wit:

I began said location at 'Potomac Spring,' and ran thence

1st. North 54 degrees 07′ West, 5.3 feet.

2nd. North 76 degrees 21′ West, 296 feet, to the top of the Backbone mountain, said point being shown upon the plats by the word, 'Backbone', thence

3rd. South 75 degrees 55′ West, 159 feet,

4th. South 86 degrees 21′ West, 91 feet, to the head spring of 'Lead Mine Run', thence down said run,

5th. North 54 degrees 24′ West, 150 feet.

Said spring and streams are shown upon the plats by the words 'Lead Mine Run.' ''

His summary, on pages 973 to 978, is merely an argument to show that his Potomac Spring is the first fountain of the Potomac, and that the Fairfax Stone is not at the first fountain. On page 973 he says:

> ''Before beginning the actual field work upon the second day of August, 1897, I had every reason to believe that the so called Fairfax Stone was not at the true first fountain of the River Potomac. The first thing to be done, therefore, was to obtain proof by actual survey as to whether said Stone did stand at the first source of the river.''

On page 975 he says:

> ''Having located these two streams, taken their elevations, determined their positions &c., it was found that the Potomac branch best fulfilled the call in the Charter to Lord Baltimore. The facts in evidence were that the two streams were practically the same in length *and carried approximately the same volume of water, there being a slight advantage in each case in favor of the Potomac branch.*''

And toward the bottom of page 975, after quoting the language of the charter to Lord Baltimore, he says:

> ''These calls of the charter are precisely and entirely complied with by the Potomac spring and stream. The meridian line from the fortieth parallel of latitude, verging toward the South to this fountain, leaves to the East, all other waters of the Potomac river.

From this point, running with the stream which flows from this spring toward the southeast, the state line of Maryland follows the same on the West and South bank, and thence on to the mouth of the river."

On page 976 he uses the following language:

"The Fairfax spring and run do not, in any way, comply with the Calls contained in the Charter. This spring is not perrennial; it is wholly outside of territory claimed and conceded to Maryland, so that, it is impossible for the Maryland State Line to run from this point; furthermore, owing to the circular curve of the stream, the South bank soon becomes the North bank, making it impossible to follow the South bank continuously from the source of the river to its mouth; again, the Fairfax Meridian runs North for three-fourths of a mile through the territory of West Virginia, cutting across the river and several of its tributaries, leaving many of the waters and springs to the west, the main stream or river running 1.9 miles further to the West, so that in no sense can the 'Fairfax Stone' said to be at the 'first fountain of the Potomac.'"

And about the middle of the page occurs this language:

"It was decided to rest the claims of the State of Maryland on the meridian running from Potomac Spring, &c."

Then, with the zeal of an advocate, (page 977), speaks as follows:

"As additional evidence of the claim on the part of the State of Maryland, numerous old land grants were surveyed, given under the Colonial Government and subsequently confirmed by the State, which show, that in 1774, this Government was the first to claim territory and jurisdiction over land lying between the lines now in controversy.

The fact of these grants having been made, and so generally extending to the west of the Fairfax Meridian would tend to show, that the western fountain of the river was known to the settlers of that early day. It is worthy of note, that up to the time of the institution of the present suit, the whole region for miles around all the headwaters of the Potomac was a wilderness, covered by virgin forest, and even to-day,

there are deer and bear in the woods and laurel thickets.

The interlocking of the grants by Maryland and Virginia, as shown upon the plats, demonstrates that no definite line, has ever been recognized by either State, as delimiting its jurisdiction and marking the boundary of its territory, although it is further shown upon the plats and by the evidence in this cause, that since the running of the Michler Line in 1859, the State of Maryland has held and exercised jurisdiction to that line, by its grants of land and the judgments of its Courts."

This last sentence is not true in point of fact, and only shows how far a surveyor, undertaking to espouse the cause of one of the parties, will go in his zeal. It is not true that no boundary line has ever been recognized by either State. Neither is it true that the State of Maryland has held and exercised jurisdiction to the Michler line since it was run in 1859, either by its grants of land or by the judgments of its Courts. It is true that, after that line was run, the State of Maryland made a number of grants of the territory between the old line and the Michler line, but no possession was ever taken under them and it is a misuse of words to say that the State of Maryland exercised jurisdiction by making these grants; neither is it true that she exercised jurisdiction by the judgments of her Courts. The only judgment that was rendered and that has been shown in the evidence was the conviction in her Courts of a citizen of West Virginia for assaulting a Maryland officer for attempting to arrest him in that territory, in which case the extraordinary ruling of the Court prevented any inquiry into the question of the location of the State line, and the defendant was not tried in this territory, but at Oakland, many miles away. This is the only attempted exercise of jurisdiction by the State of Maryland in this territory in one hundred and fifty years, so far as shown. We have thought proper to give the foregoing quotations from this report of Mr. Brown, even at the risk of emphasizing his arguments in the minds of the Court, in order that his true attitude may be made manifest and may be taken into consideration by the Court when it takes up his report and evidence.

Survey of the Prongs of the North Branch.

By reference to Mr. Brown's map No. 1, it will appear that he

designates the point where the meridian line, running from the Fairfax Stone crosses the Potomac River, as Station O. or zero, and he designates the point of junction of the two prongs West of said meridian as Station 31. He testifies that he ran the course of the river on the South bank from Station O to Station 31 and then continued on the same bank to the Fairfax Stone, making the distance 6418.8 feet. This is the distance from Station 31 at the forks of the stream to the Fairfax Stone, when measured on the inside of the circle; that is, on the left bank of the stream going up. (Record page 996). See also his report pages 903, 904 and 905 and 906, where he gives the actual runn[illegible] Mr. Monroe, the West Virginia surveyor, also measured this fork from Station 31 to the Fairfax Stone. He gives an account of this work in his report on pages 1396 and 1397, as follows:

> "A line was surveyed up the South bank of the North branch to a point which is marked 'Station 31' on the Map of the said W. McCulloh Brown in this cause. From this point, ('Sta. 31') the two forks of the River were surveyed by Mr. Brown in the manner fully described in this report and testimony heretofore taken in this cause. This surveying, together with various other lines and astronomical observations, cutting timber, etc., occupied the party until August 25th following.
>
> I do not deem it necessary to give the particulars of this running, nor of the astronomical observations, which were in the meantime being carried on by Dr. Bauer, for the reason that they are fully set forth and described in the reports by Mr. Brown and Dr. Bauer in this cause, as well as in the testimony of Mr. Brown heretofore taken. It is proper, however, to state that in running the North branch of the River Mr. Brown ran the line on the left hand bank of the stream going up, which was on the outside of the curve as shown on the map. And in running the South fork of the River he ran on the left-hand side going up, which was on the inside of the curve. After he had completed his survey of said streams in the manner indicated I surveyed said streams in the following manner.
>
> August 26th, 1897.

Upon my request of Mr. Brown, he directed the fol-

lowing members of the party to assist in the survey: R. T. Browning, J. A. Sincell and J. L. A. Burrell; Mr. Sincell and Mr. Burrell measured as follows: Beginning at 'Station 31' as indicated on W. McCulloh Brown's map, we measured up the North prong in the center of the bed of the stream as the water flows at ordinary stages, 6419 feet in all to a stake marked '97' placed by Mr. Brown in his survey as the head or source of this stream; this stream as measured by Mr. Brown as 6477.7 feet from 'Station 31.' On the following day, August 27th, the same party returned to 'Station 31' at the main forks of the stream, and measured the South branch leading to Fairfax Stone in the same manner, which we found to be 6730 feet to the point where the original Fairfax Stone stood, and 6744 feet to the first or left-hand spring, going up, which seems to be the stronger of the three. The length of this fork as run by Mr. Brown from Station 31 to the Fairfax Stone was 6418.8 feet as stated in his testimony taken in this cause. A stone was planted at head spring of the North prong of the River by Mr. Brown, and also one on the summit of Backbone Mountain, 520 feet North of said spring, planting and location of which springs are fully described by Mr. Brown in his report and testimony."

It will be seen that, whilst Mr. Brown measured the stream on the left hand bank going up, being the inside of the circle, and necessarily the shortest line, Mr. Monroe measured it in the center of the stream. This is manifestly the proper and the fairest way of measuring the stream *to ascertain its length. The purpose of these measurements was simply to ascertain which of the two prongs was the longer, and not to locate a boundary line on one side or the other of the stream.* Measured in the center, Mr. Monroe found the length of this fork leading to the Fairfax Stone to be 6730 feet to the point where the original Fairfax Stone stood, and 6744 feet to the first or left hand spring going up, which seems to be the stronger of the three. Mr. Monroe's testimony, found on pages 1705, 1706 and 1707, upon this point is as follows:

"870th Q. Going back to the neighborhood of the Fairfax stone, what is the distance from the Fairfax stone to the point where you cross the Potomac river?

A. 242 poles.

871st Q. Did you from that point where you

cross the river survey the river, and its main branches above there.

A. I was with Mr. Brown when he surveyed it. I did not myself.

972nd Q. Did you make any measurement of the length of the branch leading from the Forks to the Fairfax stone?

A. I did.

873rd Q. How is the point of the forks of the river there designated on Mr. Brown's map?

A. By black 'Sta. 31.'

875th Q. Will you designate it on your map by the same figures?

A. I will. It is so designated on the map.

876th Q. From the point 31, how did you measure the branch leading to the Fairfax stone?

A. I measured with a 100 foot standard steel tape, as nearly in the center of the bed of the stream as possible.

877th Q. Who constituted your party in making that measurement?

A. Mr. James A. Sincell and James Burrell were chainmen, and Mr. Richard T. Browning accompanied us.

878th Q. Was that measurement made during the time that Mr. Brown was doing the surveying on behalf of the State of Maryland in this cause?

A. It was.

879th Q. And these men you have mentioned—who were they?

A. They were men belonging to Mr. Brown's party, that were furnished by him at my request.

880th Q. What duties did they perform in connection with his survey?

A. Mr. Browning usually acted as chainman, and Mr. Sincell and Mr. Burrell usually as rodmen in Mr. Brown's party.

881st Q. What was the length of that branch from 'Sta. 31' to the Fairfax stone, according to your measurements made as you have stated?

A. The length of this branch from the point at the forks of the river marked station 31 to the Fairfax stone by my measurement is 6730 feet, and to the left hand spring going up 6744 feet.

882nd Q. Had this branch been previously measured by Mr. Brown under his direction?

A. It had.

884th Q. In what way did he make his measurements?

A. He ran an angle line on the south and east bank of the stream from station 31 to the stone, and measured it.

885th Q. Did he measure from angle to angle of his angle line?

A. He did.

886th Q. And it was along the south bank of the stream you say?

A. South and eastern bank of the stream.

887th Q. Is that the left of the stream going up?

A. Yes, sir.

888th Q. What was the distance as measured by Mr. Brown in that manner?

A. I took his notes for that. I do not know. 6418.8 feet, as given by Mr. Brown

889th Q. In measuring that branch in the center of the bed of the stream, did you use the compass at all?

A. I did not.

890th Q. Was this measurement taken under your immediate supervision and direction?

A. It was.

891st Q. How was the center of the stream determined?

A. Measuring the center of the bed of the stream as nearly as we could, or as nearly in the center of the water in the stream as we could.

892nd Q. Was there water in the stream at the time you measured it?

A. Yes, sir.

893rd Q. What time in the year was it?

A. In August, 1897.

894th Q. Did you also measure the north fork leading to the spring which Mr. Brown called the Potomac spring?

A. I did.

895th Q. In what way was it measured, and by what party?

A. Measured in the same manner as the Fairfax stream, and by the same party.

896th Q. What was the length of that stream, that branch, as ascertained by you according to that measurement?

A. 6419 feet.

897th Q. Had this branch been previously measured under the direction of Mr. Brown?

A. It had.

898th Q. In what way had he measured it?

A. He measured in an angle line, beginning at the station 31, on the southwestern bank of the stream.

899th Q. Is that the left hand going up?

A. It is.

900 Q. And would it be on the outside of the curve?

A. Yes, sir.

901st Q. And in measuring the branch leading to the Fairfax stone on the left hand side going up, would that be on the inside of the curve?

A. It would.

902nd Q. What was the distance of this stream leading to the spring called the Potomac spring by Mr. Brown as Mr. Brown measured it, from station 31.

A. From station 31 to the head of the stream as measured by Mr. Brown, it was 6477.7 feet.

903rd Q. According to your measurements in the center of the stream, which was found to be the longer stream?

A. The stream leading from the Fairfax stone.

904th Q. How much longer than the other?

A. 325 feet.

Mr. Brown also measured the Northerly branch leading to the Brown-Potomac spring. He measured this on the longer bank instead of the shorter, and made it 6477.7 feet long from Station 31 at the forks. See his report, pages 906 to 908, and his testimony on page 996. Mr. Monroe measured this same fork in the center of the stream and found it to be 6419 feet. See his report, page 1397, and his testimony, pages 1706 and 1707.

Comparison.

Monroe, by measuring the middle of the stream, found the Fairfax prong to be .....6744 feet

Brown, by measuring on the shortest side of the stream, found it to be .....6418.8 feet

The difference in favor of Monroe's measurement.....325.2 feet

Brown-Potomac Prong.

This prong Mr. Brown measured on the longest side and made it .....6477.7 feet

Mr. Monroe, measuring in the middle of the stream, made it ..... 6419 feet

Difference in favor of Brown's measure ..... 58.7 feet

Comparison of the Two Prongs.

Brown's Measurement:

Brown-Potomac prong ..... 6477.7 feet.
Fairfax prong ..... 6418.8 feet

By this measurement the Brown-Potomac prong is longer by ..... 58.9 feet

Monroe's Measurement:

Fairfax prong ..... 6744 feet
Brown-Potomac prong ..... 6419 feet

By this measurement the Fairfax prong is longer by ..... 325 feet

Now we submit that Mr. Monroe's measurement is fairer than that of Mr. Brown and that it demonstrates that the Fairfax prong is the longer stream by 325 feet.

Comparative Width of Forks.

Mr. Brown testifies that he measuerd the width of the running water at right angles in the two forks for a distance of 300 feet from the junction at Station 31. These measurements are given in his testimony on page 1000 of the Record. His measurements were made every 10 feet across the stream. He makes the Potomac stream an average width of 9.14 feet, and the Fairfax stream an average of 8.02 feet. See his testimony on pages 1000 and 1001 of the Record, and his report, pages 933 and 934. Mr. Monroe also measured the average width of these two branches a distance of 300 feet, taking the width every 10 feet, and made an accurate map of his measurements, showing the exact form and direction and relative situation of the two prongs at and above the junction. This is map No. 4 filed with his report and referred to in his testimony, which is not reproduced in the printed record, but we now here produce it for the Court's convenience and ask the Court's particular attention to this map. Mr. Monroe's testimony upon

this question is found on pages 1708, 1709 and 1710, and is as follows:

"906th Q. Did you adopt any plans to ascertain the comparative size of said streams?

A. I had a detailed measurement between the banks the banks of the streams 300 feet each way from station 31, at the forks of the stream.

907th Q. What did you do?

A. Took detailed measurements of the width between the banks of the streams.

908th Q. Please explain how that was done?

A. I ran reference lines from a common point at or near station 31, 300 feet up the Fairfax branch and 300 feet up the Potomac branch, and 300 feet down the main stream, and from these reference lines I measured to the right and left banks of the stream the width at every ten feet along the reference line and at right angles to the reference line.

909th Q. In measuring the width of the stream, what plan of rule did you adopt? How did you determine the banks of the stream?

A. I measured to the natural bank of the stream on each side as nearly as it could be determined on the ground.

910th Q. Have you given the result in detail of those measurements in your reports?

A. I have.

911th Q. Did you make a map or sketch showing result of these measurements?

A. I did.

912th Q. Will you produce it and file it with your deposition?

A. I will. This map is marked 'Map No. 4', showing location and dimensions of North Branch of Potomac at Junction of Forks, Julius K. Monroe.'

913th Q. What do the red lines on this map indicate?

A. They indicate the position of the reference lines with reference to the streams.

914th Q. Where those reference lines are entirely outside of the stream, how did you make the measurement?

A Measured at right angles to the first bank of the stream, and then to the opposite bank of the stream.

915th Q. And where the reference line is in the stream, how did you measure?

A. Measured to the bank on the left side, and to the bank on the right side of the reference line.

916th Q. Is this map a correct representation of the measurements as taken by you?

A. It is.

917th Q. Did you make any effort to measure the volume of water flowing in each one of those branches?

A. I did.

918th Q. Please designate what you did in that effort?

A. I built a dam across the stream, and constructed a rude trough or weir of bark, and attempted to run the water into a vessel and get comparative measurements of the flow of each stream. The appliances we had, however, were crude, and we were unable to get satisfactory measurements, on account of the vessel being too small to get accurate measurements of the time of filling the vessels, on account of the short time it took to fill the vessels.

919th Q. Your experiment then as to that matter—was it successful and satisfactory?

A. It was not.

920th Q. Did you take notice yourself of the comparative volume of water flowing from those two forks?

A. I did.

921st Q. Did you notice any difference in the volume of water in one fork from the other? If so, which appeared to be the larger stream?

A. In my judgment, the larger flow of water was in the Fairfax branch at this point.

Exception to the above question and answer.

922nd Q. Was there much or little difference between the apparent volume of water in the two streams?

A. In my judgment there was from a fourth to a third larger volume in the Fairfax stream.

Excepted to.

923rd Q. Referring again to the map No. 4, showing the location and dimensions of the north branch of Potomac junction of forks, I will ask you if this—a correct representation of the location and junction of the two forks as they flow?

A. It is.

924th Q. Does the north fork running to the Brown monument go into the stream in the manner indicated on this map?

A. It does.

925th Q. Did you run any other portions of the head waters of the Potomac river besides the two streams and that portion extending from the due north line to the forks of the stream?

A. I ran the branches of the stream flowing northward and to the east of the Fairfax stone from the junction of the river to the head springs, as indicated on the map.

926th Q. Does the river fork northeast of the Fairfax stone in the manner indicated on the map?

A. It does.

927th Q. Did you run the river from that fork to the meridian line, running north from the stone?

A. I did.

928th Q. All I want to know is, is it correctly represented and laid down on your map?

A. It is.

929th Q. Did you carefully run, and have you detailed measurements of the South Fork of the North Branch of the Potomac, lying east of the Fairfax stone and running northward, as you have stated?

A. I have.

930th Q. Have you embodied the details of those runnings in your report?

A. I have not.

931st Q. Why not?

A. Because of the volume of them, the great number of lines. I didn't think it was necessary. I could do so, if it was thought necessary.

932nd Q. Are those streams laid down on the map according to the actual survey that you made of them?

A. They are.

933rd Q. You may state how it was laid down on the map? By what method?

A. These streams were laid down on a preliminary map on a much larger scale, that of 200 feet to the inch, and carefully protracted. They were then reduced by means of a pantagraph to the scale corresponding to the map, and laid down in that manner on map.

934th Q. Is that an accurate method of reduction from a larger to a smaller scale?

A. It is.

935th Q. Were they measured and laid down in the same manner that the branches leading to the Fairfax stone and to the other spring according to

Brown's measurements were measured and laid down?
A. They were.
936th Q. And to the same scale?
A. To the same scale; yes, sir.

Mr. Monroe's report of his measurements of the width of these streams is found on pages 1399 and 1400 of the record. He does not add up these measurements and ascertain the average in his report, but we have done so and find that his measurements of the width of the Fairfax branch, make a total of 548 feet, and an average of 18 4-15 feet. His measurements of the Brown-Potomac branch make an aggregate of 482 feet and an average width of 17 23-27ths feet. A glance at the map will show that the Fairfax branch is the larger and wider stream, and this is demonstrated by Mr. Monroe's figures; the Fairfax stream averaging, as above stated, 18 4-15 feet, and the Brown-Potomac stream averaging 17 23-27 feet. By reference to map No. 4, showing the location and dimensions of the North branch of the Potomac at the junction of the forks, it will be seen that the Fairfax branch is plainly the continuation of the main river, whilst the Brown-Potomac branch comes into the main stream almost at right angles, and is plainly only a tributary, judging by the situation at that point. Mr. Brown's map, being on a small scale, does not show this, but this map No. 4 makes it manifest that the Commissioners in 1736, correctly assumed that the Fairfax branch was the main stream, because it is the larger and straighter stream, whilst the other is only a branch coming in at right angles on the North.

This evidence, therefore, demonstrates, we think, plainly that the Fairfax branch is not only the longer stream, but is the wider and straighter stream and would naturally be called the main river, as compared to the Brown-Potomac stream.

Volume of Water.

An attempt was made by Mr. Monroe to make comparative measurement of the volume of water flowing through each of these streams, but his appliances were crude and he was unable to get a satisfactory result. He testifies, however, that in making this attempt he took notice of the comparative volume of water flowing from these two forks, and that, in his judgment, the Fairfax stream was from one-fourth to one-third larger in volume than the Brown-

Potomac stream. His testimony on this point is found in Record, pages 1708 and 1709, and is as follows:

> "A. I built a dam across the stream, and constructed a rude trough or weir of bark, and attempted to run the water into a vessel and get comparative measurements of the flow of each stream. The appliances we had, however, were crude, and we were unable to get satisfactory measurements, on account of the vessel being too small to get accurate measurements of the time of filling the vessels, on account of the short time it took to fill the vessels.
>
> 919th Q. Your experiment then as to that matter—was it successful and satisfactory?
>
> A It was not.
>
> 920th Q. Did you take notice yourself of the comparative volume of water flowing from those two forks?
>
> A. I did.
>
> 921st Q. Did you notice any difference in the volume of water in one fork from the other? If so, which appeared to be the larger stream?
>
> A. In my judgment, the larger flow of water was in the Fairfax branch at this point.
>
> Exception to the above question and answer.
>
> 922nd Q. Was there much or little difference between the apparent volume of water in the two streams?
>
> A. In my judgment there was from a fourth to a third larger volume in the Fairfax stream."

So now we have shown, we think, by the testimony, which is practically uncontradicted, that the Fairfax branch is the longer, the wider and the straighter stream and contains from one-third to one-fourth more water in it than the Brown-Potomac stream. Who will say, therefore, that the Commissioners in 1736 made an error in selecting the Fairfax branch as the main river? Mr. Brown testifies that he made no effort to determine the volume of the water flowing from the Potomac and Fairfax streams. (See report, page 1001), and he does not attempt to give his own opinion as to which of the streams contains the larger volume of water. Mr. Brown's summary of the result of his measurements and surveys of these two streams is found on page 975. He says:

> "The facts in evidence were that the two streams

> were practically the same in length and carried approximately the same volume of water, there being a slight advantage in each case in favor of the Potomac branch."

We have shown that the advantage on each point is in favor of the Fairfax branch, but this language of Mr. Brown shows that there is no such difference between the two streams as would justify the adoption of the one rather than the other, so far as that depended upon the length, width, form, dimensions and volume of water.

Other Points Made by Mr. Brown.

It only remains to consider the other points advanced by Mr. Brown to prove that the Brown-Potomac stream conforms to the call of the Maryland charter more nearly than the Fairfax spring. His chief point seems to be that it is the most Westerly source of the river. This is probably true. But what is there in Lord Baltimore's charter that requires us to go to the most Westerly source of the river? The language is: "Recta linea per gradum predictum usque ad verum meridianum primi fontis fluminus de Pattowmack, etc.;" that is, "In a right line with the degree aforesaid to the true meridian of the first source of the Potomac River,"—not the most Westerly, but the first source or head spring. Remember that this fortieth parallel of latitude was to be followed from the head of Delaware Bay, Westward until it crossed the meridian of the first fountain or head spring or source of the Potomac River; that is, a line drawn through the source of the river. And it is important to note that the line was not to run, necessarily, to the source of the river, but it was to run to the meridian, then it was to verge or tend downward toward the South to the farther bank of the river, and, wherever this line, tending or verging toward the South, struck the farther bank of the river, that was to constitute the corner of the boundary of the State of Maryland. If the source or first fountain of the river should be found North of the fortieth parallel of latitude, this line, tending Southward, would strike the main river some distance East of the meridian necessarily. If the source were found South of the fortieth parallel and there should be a bend in the river, as was actually the case, so that the meridian line would cross the stream running Southward before it reached the source of the river, then the boundary line was to stop at the point where

the meridian line crossed the stream at its Southern bank and this would constitute a corner of Lord Baltimore's grant. Now apply these considerations to the actual condition of things on the ground. If we adopt the Fairfax branch and spring as the source of the river, the meridian running from that point crosses the main river at about 4020 feet and then extends on to the fortieth parallel of latitude. Now take the charter, running from the head of Delaware Bay in a right line with the fortieth degree of North latitude to the true meridian of the first source of the Potomac River; that is, to the meridian running through the Fairfax spring, then, tending downward toward the South to the farther bank of the said river; *not to the source, but to the farther bank of the river.* By following the meridian Southward from the fortieth degree of latitude you strike the farthest bank of the river at the point zero as shown on Mr. Brown's map, thence following it to the mouth of the river at the head of the bay. There is nothing in the charter that indicates that all the waters of the Potomac were to be found Eastward of the line adopted as the meridian of the first fountain of the Potomac, as Mr. Brown contends. On the contrary, it seems clear that it was contemplated that this line, which tended downward or Southward was to cross the river, after it had become a river, and was not to run to the head spring at all. If the draftsman of this charter had been upon the ground and had an actual survey of it, as we have now before us, he could not have used language that would have conformed more clearly to the ground itself than he did use when it is applied to the meridian of the Fairfax stone.

Now if we attempt to apply the language of the charter to the Brown-Potomac spring, it does not fit the situation. Follow the fortieth parallel of latitude to the meridian of the Brown-Potomac spring, then what are you going to do with the next line. The language of the charter is: "Then tending downward toward the South to the farther bank of the river." If you follow the meridian itself, you come to the spring, not to the farther bank. It will not be contended, we presume, that if it had been found that this spring was North of the fortieth parallel, the line of the charter would have run North to the spring and then tended downward to the farther bank of the river. On the contrary, if this Brown-Potomac spring is to be adopted as the point to furnish the meridian of the first fountain, then the theory advanced

by Governor Tazewell and others becomes plausible. This theory was that the fortieth degree of latitude should be followed to the meridian of the first fountain, and then a line running in a Southeastern direction, should be laid down which would strike the river at some point after it becomes a river—certainly below the forks of the Fairfax and Brown-Potomac branches. Their contention, in fact, was that it should strike the river somewhere at the mouth of Savage Run, which comes in some distance above the town of Piedmont. The language being "thence tending or verging Southward," would indicate that it was not to be run by any fixed course and distance, but in such a direction as would strike the river after it becomes a real river, and then cross the river to the farther bank, and then follow that bank to the bay.

The only other point that Mr. Brown makes in favor of the Brown-Potomac spring over the Fairfax spring, as the source of the Potomac is that the Brown-Potomac spring is on a higher level than the Fairfax. He made elaborate observations and a large part of his report is taken up in giving the result of these observations to ascertain the comparative levels of the two branches and other points in that locality. His report shows that the Potomac spring is 124.7 feet higher than the Fairfax Stone; in other words, the elevation of the Potomac spring is 3287.1 feet and the elevation of the Fairfax Stone is 3162.4 feet. He found the elevation of the spring at the head of the South prong, East of the Fairfax Stone, to be 3144.8 feet. He also gives the elevation of the head of Glade Run, which is on the West side of the Backbone Mountain, and from which the waters flow into the Cheat and then into the Monongahela and Ohio Rivers. This elevation he gives as 3261.3 feet. He gives the top of the mountain North of the Potomac spring as 3174.8 feet, and the head spring of Laurel Run as 3228.7 feet. It seems from these measurements that this Brown-Potomac Spring is a little higher elevation than any of the other springs or sources of streams located by men and flowing into the Potomac. But the charter does not say that it was to run to the meridian of that fountain of the Potomac which rose upon the highest ground, and we can hardly suppose that if a spring farther West and South than this Potomac spring had been found by Mr. Brown, coming out of the ground at a lower level, however, he would have discarded it as the first fountain because of that fact. The fact that a small stream gushes from the side of a mountain

and runs into a stream from a higher level than the main springs and streams, which constitute the source of the river, cannot give to such spring the distinction of being the first fountain of the river, because it rises on higher ground. We submit that nothing can be properly argued from this fact.

Sources of the Potomac.

Mr. Brown seems also to assume that the source of the river must be found at the foot or on the side of the Backbone Mountain, but, by the surveys made by Mr. Monroe and shown on his maps, it is clear that the North branch of the Potomac River, when it gets near its source, branches out into a number of small streams. East of the Fairfax meridian a considerable distance it plainly divides into two prongs, the North and the South prongs, and these prongs divide up into various streams. All of these streams have their source at the foot or the side of what is designated by Mr. Brown as Fairfax Ridge, one of the branches, so to speak, of the Backbone of the Alleghany Mountains. Only one of these streams finds its source at the foot or on the side of the Backbone Mountain proper. But these streams spread out like a fan, the center of which fan is about the Fairfax Stone, and it is manifestly proper that in selecting a particular point as the head spring of the stream, some point near the center of this fan-like display of streams should be selected. The head of the South prong, rising far to the East of the Fairfax meridian, could be selected with as much propriety as the first fountain or source, as the head of the North prong at the head of the Brown-Potomac spring. If we look to the other side of the Fairfax Ridge we see the waters of the Cheat and Monongahela taking the same form and rising in a number of small streams along the base of the Fairfax Ridge. Now when we consider for one hundred and fifty years the Fairfax Stone has been recognized as standing at the first fountain of the North branch of the Potomac, and that the meridian line drawn through it has been accepted as the meridian of the first fountain of the Potomac mentioned in Lord Baltimore's charter, and when we consider that the corner of the State of Maryland has not been established and recognized as being at the Fairfax Stone itself, but at the point on the farthest or Southern bank of the river, where this meridian crosses the stream 4000 feet North of the Fairfax Stone, that all of the land around the Fairfax Stone up to this

point has been granted by the State of Virginia and held under Virginia titles, and never granted by the State of Maryland, and that all the land West of the Fairfax Meridian, North of the North prong of the river leading to the Brown-Potomac Stone has also been granted by Virginia and West Virginia and held under Virginia and West Virginia titles for more than a century, and when we consider that to disturb this status would interfere with these old titles, interfere with the political allegiance and institutions of all the inhabitants of this region, and that by the lapse of time the evidence as to the establishment of these corners and lines has been lost; we cannot, for a moment, believe that the Court will now remove the corner a mile and a quarter Westward simply because it is that far Westward, and 124 feet higher in elevation, because these are the only reasons that have been given, which have not been shown to be incorrect by the evidence.

Brown's Potomac Meridian.

Having located the spring, which Mr. Brown has called the Potomac spring, and having solemnly decided that it was the first fountain of the Potomac, Mr. Brown, acting as he asserts, under the direction of counsel for the State of Maryland, proceeded to run a meridian line through that spring North to the Pennsylvania line, and he not only ran the line, but he planted monumental stones all along it with the same care and elaboration as if the work was being done as of the permanent marking of the boundary line between the two states. Dr. L. A. Bauer, an eminent astronomer and mathematician connected with the United States Coast Geodetic Survey, was employed for several weeks in making elaborate astronomical observations and locating points along this new meridian line, and then Mr. Brown, in great detail and at very heavy cost and expense, ran, with a transit, this meridian line between the points along it, which had been ascertained and located by Dr. Bauer. A very large part of Mr. Brown's report to the Court is taken up with this work, and a report was also made and filed by Dr. Bauer, giving in detail the work done by him. It seemed to us at the time, and still seems to us that this work was wholly unnecessary, if not improper at this stage of the cause.

In doing this work they were confessedly not retracing or ascertaining the location of any line previously run, or any line ever

recognized or claimed by either State as her boundary line; but here, at the end of the nineteenth century, these gentlemen, without any authority from the Court, are found making a new boundary line betwen the States of Maryland and West Virginia, tracing it through a well settled country, all the inhabitants of which have, from time immemorial, recognized the States of Virginia and West Virginia as entitled to their allegiance, and none of whom had ever heard of any claim for a line to be run through their property as a boundary line between the States. Now if the State of Maryland wished to claim this as her boundary line and endeavor to establish it in this case, it seems that the proper course would have been to fix the geographical location of the spring, which they call the Potomac spring, ascertain the location of the Michler line, or meridian, from the Fairfax Stone, which has always been recognized as the due North line, or, if there was any doubt upon this point, to re-locate it, and then having ascertained its location and the point where it strikes the Pennsylvania line, to have fixed a point on the Pennsylvania line the same distance West of the Michler line, as the so-called Potomac spring is West of said line. Then the meridian line could merely have been drawn upon the map between these two points, as showing the pretention or claim of the State of Maryland to establish this new line. This would have given just as much information to the Court as has been obtained by all the elaborate surveys, the placing of the stone monuments and other work which they have done, and the property lines of the grants made by the two States could have been laid down just as well without this elaborate survey of the so-called Potomac meridian as with it. However, we do not see that any harm is done to the State of West Virginia by this work, but we call attention to it simply to put the Court upon its guard so that it may not be led to suppose that these gentlemen were re-tracing or fixing the location of any line that had ever been recognized or established previously. We have already quoted the testimony of Mr. W. McCulloch Brown, in which he testified that they found no monument or marked trees at or in the neighborhood of what he calls the Potomac spring; that there was nothing to indicate that that had ever been marked or established as a corner or point in the State boundary; neither did he find that it was a point in any surveys of any kind. He had never heard any name for the spring before he went there, and that, in running the meridian from the so-called Poto-

mac spring, they were not attempting to re-trace or locate any old line that had been run there, but merely to lay down on the ground a meridian line North to Mason & Dixon's line thorugh this spring, and also that there were no marks of any old line ever having been run there; that they did not find any marks of trees, monuments or other indications of any such line, and he admitted that they could have run a straight meridian line from the Fairfax Stone to the Pennsylvania line and determined whether the Michler line was a straight meridian or not, without running this line from the Potomac spring or any other point. (See pages ———— to ————, ante.) This testimony is found in the printed record on pages 1043 to 1051, inclusive. This is corroborated by the testimony of Richard T. Browning, who was one of Mr. Brown's chainmen and is personally interested in the suit. His testimony is found on pages 1114, 1115, 1116 and 1117 of the Record, and is as follows:

"Q. Mr. Browning, there was no monument of any kind at that point designated on the map as Potomac spring when you went there with Mr. Brown in 1897 I suppose?

A. No sir, not that I know of.

Q. The monument that is there now was put there by Mr. Brown, or by the hands under his direction?

A. Yes sir.

Q. Did you run a line due north from that point?

A. From where we fixed the Potomac Stone?

Q. Yes?

A. Yes, sir, I suppose that was the idea, that they were running a due north line.

Q. It was apparently due north to you?

A. Yes sir.

Q. There was no marked line runinng north from that Spring, was there?

A. No sir.

Q. Where did you get the name Potomac Spring?

A. Well, we got it when we located what we supposed was the western source of the Potomac River, we called it Potomac Spring, and planted a stone and called it Potomac Stone, that is I suppose the origin of it.

Q. You, or your party under Mr. Brown's direction, gave it that name?

A. Yes.

Q. You do not know that it had any such name before you went there?

A. No sir, we dug it out of the ground and put it there, so far as that goes.

Q. Do you know when the West Virginia Central and Pittsburg Railway was built up the North Branch as far as Thomas?

A. No, I do not remember exactly, but it was in about 1882, I reckon; '82 and '83 it was finished up in there.

Q. Some 12 or fifteen years before you were there on that survey?

A. Well, I say it was about '82 or '3, and we were there in 1897.

Q. Now, how far is the town of Thomas from Fairfax Stone?

A. I do not know, sir.

Q. About?

A. Well, I could not give an idea, a correct one; I know the general lay of the country and all that.

Q. It is not more than a mile or two?

A. I suppose a mile and a half, or two miles, the station Fairfax is about, I suppose, a half mile from the Fairfax Stone, something like that.

Q. The station Fairfax upon the West Virginia Central and Pittsburg Railroad?

A. Yes sir. How far it is from Fairfax to Thomas, I do not know; not very far.

Q. Were you at the town of Thomas in 1897?

A. No sir.

Q. Were you there anywhere about that time?

A. No sir.

Q. Have you ever been there?

A. No sir—yes sir, I passed through on the road, but never off at Thomas. I passed up on the road about 1884, I reckon, it was to Davis and back.

Q. Were you at Fairfax Station in 1897?

A. To stop off you mean; passed through there.

Q I mean in 1897?

A. Yes sir, oh, yes sir.

Q. Was there a settlement there?

A. Oh, there was a few little houses, a kind of a way station, a very little business going on.

Q Now, Mr. Browning, is it not a fact that in 1897 that whole territory along the West Virginia Central and Pittsburg Railway had a great many people in it and saw mills and coal mines along it?

A. Oh, yes sir; yes sir, I suppose the mills went in there with the road.

Q. The railroad was within a half mile, or such a matter, of Fairfax Stone?

A. I suppose about that, maybe a little more or a little less. I do not know, not very far.

Counsel for State of Maryland:

Q. You used one expression with reference to Potomac Spring in your cross-examination when you said you dug it out of the ground?

A. I meant the stone.

Q. I wish to know whether your party dug the spring up or you found it there?

A. Oh, we found the spring there, and a pretty good one, too.

Mr. Price:

Q. But you give it the name of Potomac Spring?

A. Oh, yes sir.

Q And you meant that you dug the name out of the ground?

A. No, sir. I did not mean that, I meant that that was the Potomac Stone, and I suppose that they understood that hereafter it was to be the southwest corner of the State of Maryland.

Q. That is, your party were making the northwest corner of the State of Maryland, and calling it Potomac Spring?

A. Yes, sir, subject to decision, of course."

This Potomac meridian, so-called, is about one and one-fourth miles West of the Michler line, or Fairfax meridian, and if the State of Maryland can succeed in having it established as her boundary line she will get a territory thirty-six miles in length and one mile and a quarter in width, making forty-five square miles of territory, which has always been regarded by everybody, as within the State lines and jurisdiction of the State of West Virginia. All the territory between the Michler line and this so-called Potomac line is covered by grants made by the State of Virginia. These grants go back considerably more than a century, and the country has been settled by persons claiming the land under these grants, and the property has been transmitted from one to another by conveyance, inheritance or will, under titles recorded in Preston Coun-

ty, West Virginia, in which County the lands have been assessed, taxes paid, the roads worked, the school established and maintained and all the rights of the citizens exercised in the usual way. The State of Maryland has never had any jurisdiction of any part of this territory. The testimony upon this point is conclusive and uncontradicted. We invite the Court's attention to the evidence of the witnesses A. M. Fike, H. A. Shafter, Daniel J. Nordick, Ross Cuppet, D. B. Groves, William G. Brown, Marcellus Albright, C. H. Loar, Wesley DeBerry, A. J. Elliott, H. J. Freer, found on pages 1561 to 1616 of the printed record, and also the testimony of U. N. Orr, page 1769, with the Exhibits referred to therein; also the testimony of Joseph Rembold, Jacob Slaubaugh found on pages 1876 to 1878 of the printed Record. The following is a brief statement of the evidence of these witnesses, which we have condensed for the convenience of the Court:

A. M. Fike testifies that he is forty-two years old; that he resides on his farm, marked on Map No. 1 "A. M. Fike"; that his land adjoins the old line and he lives about one-eighth of a mile from the line, and has lived there twenty-one years and was born three-fourths of a mile from where he now lives. His father was Aaron Fike and lived on that place fifty-four or fifty-five years. His father came to the land when he was eleven years old, and he was sixty-six years old in 1906, when the deposition was taken. His house is thirty-five or forty rods West of the Michler line, which runs through his place; that his land extends six or eight rods East of the Michler line, and that the boundary line between the States of Maryland and West Virginia, as he has always recognized it, is along the Eastern side of his land. The Eastern boundary of his land conforms to the State line. He bought the land from Abram Wiles, who had lived on it from the earliest recollection of the witness. This land is all assessed in West Virginia; votes at Eglon; that Mr. Wiles and witness's father voted and paid taxes always in West Virginia, and the children went to school in West Virginia. Witness has worked on the road since he was sixten. There are roads running East and West, crossing the boundary line between the two States, on which he worked and they always work Eastward to the old line, three different roads, always work them to the old line beyond the Michler line. The Maryland authorities never work the roads West of the old line, nor collect any taxes nor exercise jurisdiction in any way. Witness knows where W. McCul-

loch Brown ran his line in 1897, from the Brown-Potomac Stone. He saw them running a little of it. Witness lives just about a mile East of the Brown line. He knows the people living between the Brown line and the Michler, or old State line, and gives their names, extending South nearly to the Backbone mountain, and Northward to the Northwestern pike; that is, from a point nearly as far South as the Brown monument, which is on the other side of Backbone Mountain to the point marked "W. D.", or where monument No. 2 stands on the Michler line, more than eight miles from the Fairfax Stone. He gives the following names as those which he recollects living between the old Maryland line, as he recognizes it, and the line run by Brown, extending from near the foot of the Backbone Mountain Northward to the Northwestern pike: William S. Weimer, Leonard Simmons, George Winters, Henry Beckman, Lloyd Dawson, Adolphus Fike, Aaron Fike, Emory Fike, Dennis Biser, C. P. Jones, Obid Hamstead, Moses Fike, C.F.Shank, Albert Rush, Frederick Slaughbaugh, Eli Slaughbaugh, Ed Winters, Elijah Bachtle, John Slaughbaugh, Bud Winters, Charlie Winters. He says there are a good many along the railroad that come and go, whose names he cannot give. The farthest man South named is Bud Winters. He testifies that all these people he has named vote in West Virginia, and that as far as he can recollect, it has always been the case that the people living in that territory voted in the State of West Virginia; that their lands are all assessed for taxation; they pay their taxes in West Virginia, and none of them pay any taxes in Maryland; that, under the West Virginia system of working roads, these people work the roads Eastward to the old line and always did. Witness had never heard of any boundary line between the States being claimed or run along where Mr. Brown ran his line, or in that neighborhood prior to 1897. The only two lines he had ever heard of before that were the old original line and the Michler. He testifies that his tract of land is correctly located on the map and designated by the words "A. Fike." He bought it from A. D. Wise; that his father lived adjoining the land marked "Peter Fike", and he bought it from his grandfather. He does not know anything about the Goff land. He testifies that Silas Fike owns the first, Henry Beckman the second and Lloyd Dawson the third tract of land North of his place, and adjoining the Maryland line, and Offutt owns the land next to Dawson further North; running Southward from the land of wit-

ness comes William S. Weimer, Adolphus Fike, Dennis Biser, C. P. Jones, Obid Hamstead and Eli Slaughbaugh. He is not sure whether Frederick Slaughbaugh runs out to the old line or not. Then next comes Elijah Bachtle, Creed Stemple and Charlie Winters. These hold adjoining the old line. He then gives the names of the landowners between his property and the line run by Brown: Len Simmons, George Winters, Lewis Bush and Daniel Switzer, also Joseph Rembold. He says the Brown line runs through the Bush and Switzer place, also through Rembold's, who lives four miles or over farther South than witness. Rembold votes at Eglon, Union District of Preston County, which point is two miles West of where witness lives. Witness further testifies that the country between the Backbone Mountain and the Northwestern turnpike is pretty well cleared up from the foot of the mountain and has been so as far back as he can recollect. He testifies that his tract of land is, in his opinion, correctly laid down on map No. 1, with reference to its relation to the adjacent lands and to the Michler line, and the old line, and this is true, also, of the lands in that neighborhood. He further testifies that the old State line, along the country which he has been speaking of, is a straight line so far as he can tell. Witness was never at the Fairfax Stone. He never saw the old line run, and all he knows about it is what others have told him. He says that when he bought his place there was a stake on it, which Mr. Abram Wiles, from whom he bought it, told him was on the Michler line. He further testifies that the line run by Julius K. Monroe, in 1894, was about eight or ten rods East of the Michler line through his place, and that it was pretty near on what he recognizes as the old Maryland line.

H. A. Shafer testifies that he is fifty-nine years old, lives in Union District, Preston County, at Brookside, and has lived all his life in the same house where he now lives, owns the land on which he lives, bought it from the heirs of his father, Isaac Shafer, who lived on the land before he got it, it having come to him from witness's grandfather, T. Walt Shafer. His grandfather got it from Goff according to the old original deed, and that this land had been in his father's family since November 27th, 1815. Witness testifies that his tract of land appears to be correctly laid down on map No. 1, and designated by the words "T. Shafer," and that the Rhine Creek and Youghhiogheny River appear to be

correctly laid down. Witness knows where the Michler line is, and testifies that it is a mile or a mile and a quarter directly East of his residence. He also knows the line run by Mr. W. McCulloh Brown in 1897; saw it run. It is about fifty feet West of his house and runs through his place. He never knew of any State line in that locality but the old one and the Michler line. The old line is ten or fifteen rods East of the Michler line. Witness worked as supervisor of roads in that neighborhood for fifteen or eighteen years. The road which he worked runs across the State line. Witness lives on Rhine Creek, and the road follows down Rhine Creek to the Yough, then runs along the Yough across the State line. Witness worked the road as supervisor as far East as the old line, the Deakins line. This work was done under the authority of the County Court of Preston County, West Virginia. Witness was deputy supervisor until January, 1906. Washington Fike is the supervisor now and works the roads just as witness did. Maryland authorities work no farther than the old State line, or Deakins line. They do not come over as far as the Michler line. Witness knows where the line was run by Mr. Monroe in 1894. The old State line is East of the Monroe line. The Monroe line is between the Michler line and the old State line. He further testifies that Washington Fike's house is East of his, and that Offutt owns the land Southeast of witness. The road crosses the Michler and old State line North of where the Yough crosses it. It is very close to the point marked 300 on the map. East of Washington Fike's and between that and the old State line the Preston Lumber Company owns the land. They bought it from a man by the name of Bowman. Witness then gives the names of the land-owners, going from the Northwestern pike Northward, between the Brown line and the old State line, as follows: Amos Shellenberg lives on the Offutt farm, also a man by the name of Parnell; then comes Ed Parker, William Ewitt, Jesse Roomers, Job Roomers, F. S. Roomers, John Beckner, Lee Guthrie, Charlie Foulk, Eusebius Ashby, and two men who live back in the woods, and who have been there just a short time, Henry Packer and John Noon; also Dorsey Ashby. This takes you two miles North of the Northwestern turnpike. Packer and Noon are the fartherest North. They live on the Preston Lumber Company's tract. The Preston Lumber Company's land extends probably three miles North of where witness lives. (By reference to

the map it will be seen that the Preston Lumber Company land is marked "Preston Lumber & Coal Company," and extends beyond the eleventh mile on the Brown line, which is nearly up to the thirteenth mile on the Michler line). Witness further testifies that the people named by him vote in West Virginia at Aurora, which is about three miles Southwest of where he lives. He has served as commissioner of election there for sixteen or eighteen years and knows that they vote there. They pay their taxes in West Virginia; he, himself, has assessed the capitation tax and collected it for the year 1906 from these people. He has never known any Maryland tax collectors to be over in that country collecting taxes. They send their children to school in West Virginia. Witness's own land is assessed in West Virginia and he votes in that State.

Daniel J. Nordeck testifies that he is fifty years old; lives in Portland District, five miles from Terra Alta, Preston County, West Virginia. He owns one hundred and seventy acres of land, where he lives; has lived on it since about 1883, bought it from his father, John P. Nordeck, who lived on the land for fifty years, bought it when it was in woods. It belonged to an Ashby survey of five hundred and some acres, and his father probably bought it from a man by the name of Saucer. Witness is not sure about that. Witness does not understand anything about the Michler line, but considers that the State line is about two miles East of where he lives. He knows where the Brown line was run in 1897, just East of where he lives, not a quarter of a mile from his house, cuts off a little of his land. Witness never heard of any State line there before that line was run, but had understood the State line prior to that time to be about two miles East of where he lives. Witness's land is assessed for taxation in West Virginia and he votes and works the roads in West Virginia. Witness's land is West of the land of the Preston Lumber Company, but does not adjoin it. Samuel DeBerry owns the land North of him and also William Hollis. The line run by Mr. Brown goes through Mr. Hollis' farm and part of the DeBerry land: the biggest part of that laid East of this line.

Mr. Samuel B. Crane did own a farm between where witness lives and the old Maryland line. Edgar Crane owns it now. They have owned it since witness can remember. The Brown line ran through his farm, near the house. Witness knows the

Schoolfield land. It lies Northeast of where he lives; part of it lies in Maryland--the biggest part in West Virginia and lies along the line. The tract of land owned by Fredbock is Northeast of where witness lives. A man by the name of Sisler lives there now. A man by the name of Jennings owns the land North of Fredbock. Fraley owns a piece in there and another man by the name of Shafer. These people all vote in West Virginia, at Corinth, on the Baltimore & Ohio Railroad, farther North. Witness votes at Corinth; votes for the governor of West Virginia and other officers. Mr. Van Worth owns a piece of land just Southeast of witness: the Preston Lumber Company owns the land South of him.

Ross Cuppet testifies (Record, page 1579), that he is forty-six years old: his land adjoins the Pennsylvania line; his house is probably a quarter of a mile from the line. The line run by Mr. Brown runs through his farm East of his house about a hundred yards. He has 320 acres, and about 35 or 40 acres extend beyond the line run by Mr. Brown. Witness knows where the Michler monument is on the Pennsylvania line. The people living there claim the State line to be further East than the Michler monument. They pay their taxes, vote and work the roads further East. Witness used to be road supervisor there and the State line was pointed out to him where he was to work the roads by the citizens. Joseph Niner, Owen Evans and two or three of the Fikes lived there. Witness has lived where he now lives all his life, with the exception of a couple of years away. He got the land from his father, A. Cuppet. The land formerly belonged to witness's grandfather, Daniel Cuppet, and was sold to witness's father by Thomas Scott, a Commissioner of the Court. The most Eastern point of this land is possibly three quarters of a mile West of the Michler monument. Silas Beerbower, Martha Miller and Joseph Niner own land lying East of this land. Witness worked the road between a quarter and one-half mile farther East than the Michler monument. Abram Thomas's house is East of the Michler monument. He votes in West Virginia at Glade Farms and as also do Niner and Abram Fike, and also Elijah Fike. They live in West Virginia right West of the old State line; that is where the road was that witness worked, where Elijah Fike lived. The house is there now.

Witness names the following persons who own lands South and East of the line run by Mr. Brown, some of which the lines crosses, and others it does not cross, namely, Joseph R. Miller, Lee Cuppet, Silas Beerbower, Joseph Niner, N. M. Thomas and a man by the name of Lewis, Mrs. Owen Evans, Abram Fike, Elijah Fike, Isaiah Umble, Mrs. John Van Sickle, Charlie Van Sickle, Elias Van Sickle, Albert Robinson, James Spurgin, Trueman Frazee, Joseph Guthrie, Samuel Lininger, Jesse Fike, Sylvanus Fike, Ross Frazee and Zelman Cuppet. These are the most witness can recollect now, so far as Grant District runs across there. It runs right where Edward Jones lives, and as far South as where Marshal Friend lives. He is dead, but used to live in Grant District. All these people named by witness vote at Glade Farms, Preston County, West Virginia. There has been a poll there twenty-five years, he supposes. They used to vote at Brandonville. They vote for West Virginia State officers, pay their taxes and send their children to school in West Virginia. There are three or four school houses strung out across the lower end of Grant District, Cuppet school house, North Avenue school house and South Avenue school house. These schools are supported by taxes from West Virginia. Witness had never heard of the State line running through his place or along there until Mr. Brown's line was run in 1897. None of the inhabitants ever recognized the Michler line as the State boundary line.

D. B. Groves testifies (Record, page 1583) that he is thirty-two years old; reside half way between Terra Alta and Cranesville, known as the Oak Grove settlement, and owns 106 acres of land, which was deeded to him by his father, W. H. Groves, who got the land from Thomas Brown; that he used to live in Kingwood, James A. Brown's father; does not know where Brown got it from. His father lived on the land and he and his father together have lived on it something like thirty-five years. It has been assessed, and taxes paid on it, in the State of West Virginia to the sheriff of Preston County during that time. He and his father have voted at Terra Alta, Preston County, West Virginia, for officers of the State of West Virginia. John Metheny and M. J. Lee own land lying North of witness, and, going on North, John R. May and M. H. Taylor. The line run by Mr. Brown in 1897 cut off about one-third of

witness's land and runs on the East side of his house right close to the house, through the orchard. Witness lives about a mile and a half or two miles from the State line, as it has always been recognized and known to him. It lies that distance East from his house. He had never known of any claim being made of there being a State line through his place before that line was run there in 1897. He names the following persons that live between the old State line and this new line, which was run through there by Mr. Brown, namely: Greeley Teets, Henry Lewis, Lee Groves, Wesley Lewis, Mose Groves, Frances Metheny, Silas Titson, Ed. Ross, W. T. Groves, Thomas Spahr, William Lewis, Preston Ringer, Henry Ringer, Jim Ringer and Age Hayes. There are others, but witness cannot recall them. All that he has named live between this new line that was run in 1897, and the old State line, as he has always understood it. They extend North nearly to Cranesville and South about half way to Terra Alta. Witness expects he has not named everybody that lives in that space, but nearly all. There is Jeff Friends and Mike Friends not heretofore named. All these people that he has named vote at Terra Alta at general elections and at primaries they vote at Tera Alta and Cranesville. They always vote for West Virginia officers. Witness has never known Maryland to hold any election in that section and has never known any Maryland officer to collect taxes nor the State of Maryland to exercise any jurisdiction over any of the territory he has named. Witness holds his own land under a West Virginia title. He had never heard of any tract of land patented by the State of Maryland called "Nonpariel." There is no such tract in his neighborhood that he knows of. None of the people in that neighborhood claim under a Maryland title that he knows of. There is a school house at White Oak Springs, a quarter of a mile, just about due East from his house, that is between these lines. The school is supported and the teachers employed by the Boards of Education of Portland District, Preston County, West Virginia. Witness's lands have been recently assessed under the new law by Major U. N. Orr, of Kingwood. The old Burchinal road is 300 or 350 yards from his house. The new line, Brown's line, was run about 3 rods from witness's house. His house is South of the Burchinal road. John Metheny and N. J. Lee adjoin witness on the North.

The Burchinal road runs through Mr. Lee's place. The head of White Oak Spring and Run is right below witness's place. His spring is really at the head of it. The school house was named after the spring and the run there. Besides the old Burchinal road there is the Cranesville road, which runs something near North and South. It lies East of where witness lives in about the same distance from the school house. The school house lies between the Burchinal road and the Cranesville road. They fork there. The school house lies right in the corner. The Cranesville road runs on to Cranesville, between this new line and the old State line, and witness thinks it does not cross either road. The Cranesville road is worked by the authorities of West Virginia.

William G. Brown testifies (Record, page 1587) that he is fifty years old; lived all his life in Kingwood, West Virginia. He is an attorney at law. Kingwood is the County seat of Preston County. Witness, jointly with E. D. Bowman and T. Pickenpaugh's heirs, own a tract of 700 and some acres along the line between Preston County, West Virginia, and Garrett County, Maryland, being part of the balance of the Hoye survey of 3600 acres. They acquired a tax title to this land by a deed from J. Ami Martin, Clerk of the County Court of Preston County, dated December 6th, 1895. This deed conveys that portion of the 3600 acre survey of John Hoye, which lies between the old and new Maryland lines, and states the quantity of land conveyed as 1230 acres. This deed is found on pages 1771 and 1772 of the Record. Witness and his co-owners are only now assessed with 779 acres. He is not sure whether they have sold any part of this land or not, and they have owned several other portions of this survey and sold different parcels of it. He and Mr. Gibson acquired title to part of it at a tax sale and part of it they purchased in the chancery cause of John P. Jones v. John Hoye and others. The first portion that he owned was as far back as between 1885 and '90. One tract he sold to a man by the name of Metheny; another to Chancey Martin; another to John Hoye, and there may have been other tracts sold. Looking at Map No. 1, prepared by Julius K. Monroe in this cause, this 1230 acre strip of land lies East of the line indicated by the square dot marked "Snaggy Mountain"; the old State line was East of the Michler line. Those portions of the Hoye land,

which witness sold, lie West of the Michler line. All this land about which witness speaks has been assessed for taxation in Preston County, West Virginia. This is true of the strip lying between the old line and the Michler line. They have been paying taxes on it regularly from 1895 and the taxes were collected before that upon the Hoye estate. It is one of the old titles and witness presumes the taxes have been paid on it since the time it was patented in Virginia and West Virginia. He has knowledge that it was paid for several years before he bought it, because he looked it up, but how far back he does not know. The delinquent taxes for which it was bought were assessed against David Hoye. The Maryland authorities have never attempted to collect taxes from witness on this land, and he knows of no other claimant to this land paying taxes on it to the State of Maryland. They have had no interruption in their title. They have had no notice of any other claimant. This strip of land between the old and the new line is woodland and there are no improvements on it. There are numerous farms and farmhouses on the other parts of the 3600 acres and of the parts they sold. Metheny lives on his piece, Hoye's grantee lives on the 100 acres that was sold to John Hoye, and a man by the name of Wilhelm lives on the Chancey Martin tract, as he is informed. All of these people consider themselves citizens of West Virginia. The taxes upon their lands have been paid by the witness to the State of West Virginia, and witness knows that they vote and claim citizenship in the State of West Virginia.

Marcellus Albright testifies (Record, page 1591), that he is sixty-three years old and lives at Terra Alta in Preston County, West Virginia, on the Baltimore & Ohio Railroad; has lived there four years; before that time lived on a farm near Cranesville. He moved on to this farm in 1885. He attended his father's grist mill for two years at the Albright mill within two miles of Cranesville. This is where he was born. It is in the same neighborhood where his farm was. He was born February 22nd, 1843. He lived on his farm near Cranesville in 1897, when a line was run through it by Mr. Brown. He had never known of any claim of any Maryland line running along there before, but knew of two State lines before that; one known as the Michler line, which was cut through in 1858 or 1859 in the

neighborhood of a mile East of his place. The old State line was still East of that, between sixty and eighty rods. Witness sold his land to James Wolfe and had sold a part to his brother and a part to Jacob C. Wolf. Witness got the land from his father, who got it from John Crane, his grandfather. Witness's mother was a daughter of John Crane. Witness remembers his grandfather, John Crane. He lived on this big farm. The Michler line in 1859 ran through John Crane's farm, both the old lines ran through his place. His residence was forty or fifty rods West of where the Michler line is. He owned a big scope of land at that time. Witness cannot give an estimate of the quantity of land. He does not remember what his farm contained, but he owned four or five thousand acres in the mountain there. He owned the farm that Sol Feather now owns, the farm that Doc Hartman owned, the one that Hen Spindler and Ringer now own, also the farm that witness had, and he does not know how many more there—a big scope of land that he had the whole business of about. John Crane moved there before witness's time, and he thinks he died in 1858 or '59; lived there from witness's earliest recollection. He claimed his land under a Virginia title; claimed to be a citizen of Virginia before the War, and West Virginia afterward: voted in Virginia. Witness always claimed his residence in Virginia before the War and West Virginia since. His first vote was for the creation of the State of West Virginia. He voted then at Brandonvile, in Preston County, and the votes that witness has cast since then have been in West Virginia. He has paid his taxes in Preston County. Witness gives the names of the people, his neighbors adjoining his farm, who live between the old State line and the line run by Mr. Brown in 1897, as far as he can remember them as follows: starting at the foot of the mountain there are David Wolfe, James Wolfe, Andy Collins, Jacob Wolfe. That takes it to the Cranesville road, then there is Falkenstein and Notley Browning, and then comes Mike Feathers and Wes. Dave, and Joseph Feathers, David Shafer, Abe Hays, Preston Ringer, Israel Miller, Emanuel Matheny, George Matheny, and then William D. Tichnell, David Friend, and the Taylors. Witness is not positive about the Taylors, whether this new line ran through them or not. There is some Groveses, but he could ont name them that own between the lines. That takes it to about

White Oak Spring. These people that he has named claim their residence in West Virginia, except Falkenstein, who rather claimed his in Maryland. They all vote in Preston County, except Falkenstein. Witness has seen them at the polls at the elections held under the authority of the State of West Virginia; has never known any jurisdiction to be exercised by the State of Maryland over any of that territory. The lands in there are assessed in West Virginia, excepting Falkenstein's and witness isn't positive about his, but he always claimed his residence in Maryland. He does not know about his lands where they are assessed, but expects part of them probably are assessed in West Virginia. The public roads running East and West in that neighborhood are what they call the Pike Hill road; runs down past Browning's and Falkenstein's, then there is a road that runs through Cranesville, runs toward Sang Run, and then there is one that runs down in the swamp. Witness worked the roads to the West. He had nothing to do with the working of the roads East of his place. He thinks that the West Virginia authorities worked the roads most of the time to the old line. It might have been sometimes they did not go to the old line—only to the new, but witness had nothing to do with the working of the roads up in that District. Witness is then asked whether he is correct in saying that old John Crane's residence was West of the Michler line. He says he thinks it was, but testifies that the old John Crane residence was right where Mike Feathers now lives. He built part of it on the old foundation. This is where Mike Feathers lived at the time of his death—lived wher old John Crane lived. (Note: Mike Feathers' residence is indicated on Monroe Map No. 1 by the square dot and the words "Mich' Feather" nearly opposite the red figures "F 3," and almost directly opposite Station 7901 East of the Monroe line and West of the old State line.)

C. H. Loar testifies (Record, page 1596) that he is forty-six years of age; lives at Oakland, Maryland; is a general merchant. His father purchased from Reuben Morris, about 1881, a tract of 600 acres of land in Preston County, which was originally patented from Governor Johnson of Virginia to Wilson, Morris and Byrne. His father has since died and devised the land in fee to his mother, Mary C. Loar, who resides at Oakland, Maryland. They had this land surveyed first by Mr. Reuben Morris

himself, and then about five or six years ago by Mr. Julius K. Monroe, the same man who is the surveyor in this suit of Maryland v. West Virginia, and who was present at the taking of the deposition. Witness was present at the time Mr. Monroe surveyed it; has been over all the lines of the tract except the boundary line between the two States. They began the survey at a point on the old State line and ran around the other lines back to another point on the State line. They did not run the State line between these two points. The Michler line was shown to witness by George Mosser, who lived in that country right adjoining this line. He showed both the Michler line and the old State line to witness when they made the survey and previous to that. Witness cannot say that he saw any monument on the Michler line, but Mosser took him and showed him where the line ran through. The Michler line was not the line on which they began and ended their surveying. It was on the old line. Witness is not clear in his recollection, but he thinks that the old line was East of the Michler line—is not certain about that, but that is the best of his recollection. This tract of land has been assessed for taxes in Preston County, West Virginia, and the taxes have been paid on it there up to the year 1906, when the deposition was taken. The land is not settled up or cleared. It is in the wilds, absolutely a wilderness, no tenants on it. There is no conflicting title with it, so far as the Maryland people are concerned, so far as witness knows or recollects. He knows of no conflicting claim with it, of no one holding under a Maryland grant along there. Mr. Rumbarger, when he first began lumbering in that country, went in and cut some walnut trees off this land, but Mr. George Mosser and Eli Mosser, who were conversant with the lines, and also Young Morris notified Rumbarger that he was over the line, and after that he quit. Young Morris was a son of Reuben Morris. Witness had no personal knowledge of Rumbarger's cutting the timber, except that George Mosser showed him where the timber had been cut, and they also had a letter from Rumbarger stating that he cut timber on his own land, but it was his men that went up there and cut the timber. They never got any money from Rumbarger for that timber, but were about to bring suit against him when he failed in business and no suit was brought because there was no use to bring it from the fact that Rumbarger had

failed. Witness can see, from looking at the map, that the Wilson, Morris and Byrne tract, which his mother owns, is correctly located on the plats in this case. He knows this by its location and shape. He has no other knowledge than this.

On re-direct examination he testifies that it was Mr. Julius K. Monroe that ran out their lands—the same man who is now present, and who has been surveyor in this case, and that witness was present with Monroe at the point on the old line where he started and where he came around to below or above.

Wesley DeBerry testifies (Record, page 1600) that he is forty-six years old; lives at Terra Alta, Preston County, West Virginia; was born in Preston County near the town of Corinth—one mile from Corinth, and that had been his home all his life, but he has staid some in Terra Alta. Corinth is on the Baltimore & Ohio Railroad West from Huttons, something like three-fourths of a mile. It is a mining town and there is said to be something like three hundred working men there. It varies considerably—a kind of floating element there—a good many miners coming and going. It is hard to tell just what the population of the place is. Witness was previously examined in this case. He owns land in that neighborhood; one piece of it about something near a mile from the town of Corinth in a Southwesterly direction from the town, and that another piece lies South of Corinth and Huttons, that is, taking something near the center of the two places, he would judge it was about South of the center between those two points. He knows where the Michler line runs through there. There is a stone at the railroad where the Michler line is said to cross. Witness knows where there are two other lines said to be Maryland lines; one is East of the Michler line and the other West of it. The one East is something like sixty rods from the Michler line. Witness had never heard of a Maryland line West of the Michler line until 1897, when Mr. W. McCulloh Brown ran a line through there. He had never heard of any Maryland line over there before, and the only reason he spoke of that as a line is because of this survey that was made in 1897. Witness never measured the distance between the Michler line and this Brown line, but supposes it is something over a mile between the two lines. The Brown line ran through some land owned by witness. Witness got it from his father, Samuel DeBerry—one hundred and ninety-

eight acres. He bought it from David Freeland in 1850 some—it was before 1860. His father owned it from that time until witness got it, and he has owned it since. This land is assessed for taxes in Preston County, West Virginia. In 1897, when the Brown line was run, the following people lived between the old Maryland line, as witness recognized it, and the Brown line as far as he can recollect them: Samuel DeBerry, Daniel Frankhauser, K. B. Frankhauser, Garrett T. White, Irvin Jennings, William Saucer, George Freeland, Warren Felton. His initials were E. W. Felton, and S. B. Crane; not sure which side of the line his house was on. It ran through his land, this line that was run in 1897. Then there were other parties living on the land witness owned by the name of Fraleys, also Daniel Shafer. This is as far as witness can recollect the people who lived in there. Since 1897 all these people, living in between the old line and the new line, as run by Mr. Brown, have always voted at Corinth, in Preston County, West Virginia, for officers of the State of West Virginia, Preston County and District officers. Witness supposes they voted for them. They cast their ballots. The elections were held under the authority of the State of West Virginia, in the County of Preston. There was an election precinct at Corinth. The lands are assessed and taxes paid in West Virginia along there; has never known the State of Maryland to exercise any jurisdiction in that territory. Witness knows of a tract of land called the Fredlock tract, located Southwest of Huttons, in Maryland. With reference to the Maryland line, it runs in West of the Michler line, between the Michler line and the old line, the old original first line that we knew of. The Michler line runs through it; some of it on each side of the Michler line. It extends over the old line. There are some marks on trees there that show where the old line is, as witness recognizes the line. He thinks there are old marks. Then there are later marks along there. There was a survey made there in the last few years, and the survey retraced, and some newer marks. He thinks the Preston Lumber Company's men ran through there and trimmed out the old line and possibly made a few new marks. Witness has owned part of the Fredlock tract about twenty-five years; got it from Henry Fredlock. That tract of land is assessed in West Virginia, all of it. Witness pays no taxes on any part of it in Maryland. The East-

ern line of that Fredlock tract, witness supposes, is fifty or sixty rods East of the Michler line. Some of the land is cleared up along the old Maryland line. There is a field that has been cleared and growed up. The old fence is still there, and there is some of the land that is cleared, and been cleared. Connell owned the land on the other side, or the Maryland side, East of the old line, and witness thinks he sold it to the Preston Lumber Company. West Virginia carries on the public schools between the old line and the line run by Mr. Brown. They have a double school house, two schools in one building. Corinth is East of Mr. Brown's line, between the Michler and Brown lines. Witness is not sure in what original tract his land was embraced. He does not think it belonged to the Deakins survey, but kind of thinks it was patented under Hooker—he is not sure. His father bought it from Freeland fifty years before witness's deposition was taken.

On cross-examination witness testified that the land that John A. Connell owned East of the Freelock tract was not a part of what is known as the Schoolfield tract. The Schoolfield tract lies, he thinks, South of that tract. Witness does not know what tract it was that Connell owned East of the Freelock tract. They have their tracts named "Kindness" or something like that, but he does not remember what name that land has. Witness does not know where the line is that Mr. Monroe ran in 1894. Witness does not think he ever saw anyone run any of these lines under the authority of the State, or for the State, except the line run by Mr. Brown. Witness is a surveyor. He works at it some.

A. J. Elliott testifies (page 1605) that he is forty-nine years old; lives at Terra Alta; has been a civil engineer all his life until the last six years. He is now in the milling business. Before going to Terra Alta he lived at Reedsville, in Preston County, seven miles above Kingwood on Morgantown Pike; has lived at Terra Alta twenty-six years; has been surveying land, more or less, every year since he was seventeen years old up to within five or six years before his deposition was taken; has surveyed the lands belonging to the William B. Crane estate in the neighborhood of the Maryland line. It is cut up into small tracts now, a great deal of it, in fact, all of it, and he thinks that he has not only surveyed the outline of the original tract, but did

either the cutting up, or resurveyed it. Some had been surveyed before he went over there. That land is located, speaking generally, from the Baltimore & Ohio Railroad, taking that as a known point, about two miles North of that on the Maryland line. From the Maryland line on the railroad it is more than two or three miles, four miles perhaps, but the nearest point on the Baltimore & Ohio Railroad down Snowy Creek, is about two miles. That would be the South side of the William B. Crane estate, as witness knows it; then it extends along the Maryland line to the Burchinal road, the old State road that went through that country, and from the Maryland line it extends Westward four or five miles, in that neighborhood. Witness does not remember the number of acres, but would say that this tract embraced three or four thousand acres all told; it might be more than that; it might not be quite that much. Witness has been surveying these lands each year, some of them, from 1881 up to 1901 or 1902. He never made a survey of the entire tract at one time. During that time it was owned by William B. Crane's heirs. He died probably in 1876 or 1878. William B. Crane got the land from Jacob Crane, his father, by inheritance. South of these Crane lands, in the neighborhood of the Maryland line, are the Ward lands, afterwards owned by Major U. N. Orr. It is a large body of land. It is the Deakins patent of 6000 acres. The Burchinal road was the Northern boundary of these Crane lands most of the way, perhaps all the way. The landowners, as witness knew them twenty-five years ago, North of the Burchinal road, were the Friends, the Lewis, the Taylors and the Dodges. The deed dated August 10th, 1846, for 1246 acres from John Hoye to Jacob Crane, filed with witness's deposition, marked "Elliott Exhibit No. 1," found on pages 1772 to 1775, inclusive, was gotten by witness from the Crane heirs while he was surveying part of their lands, and he used that deed in connection with other deeds in locating the lands. This deed covers the Northern part of the Crane lands along the Burchinal road along the Maryland line. Looking at Monroe's map No. 1 in this case, the land embraced in this deed appears to be correctly represented on the map, so far as witness can see. In locating the Crane lands along in that locality, witness adopted the old boundary line as the Eastern boundary. This is East of the Michler line. Witness was acquainted with the location

of the Michler line. He learned of it from Mr. A. C. Baker, who was county surveyor, and lived at Evansville. Witness went with him to locate some property that adjoined the Maryland line, and, in surveying it, came to this Michler line. Witness was not familiar with the Michler line or any other line; that was the beginning of his surveying in that section of the country. This was not on the Crane land, but farther North on the Hoye lands. There was trouble between men who claimed land in there and they ran their distance and found another line, and they then retraced that old line that witness now knows as the old Maryland line, and Baker told witness about the Michler line and witness followed it quite a number of times through there. A. C. Baker is dead. Witness has seen the monument, at Corinth, on the Michler line and in Pleasant District, the lower end of the County; he has known of two monuments over there. Witness knows where the Michler line is, relative to the old line. In surveying these Crane lands, he did not stop at the Michler line, but extended them East to the old line, probably thirty or forty poles. He does not know definitely. Through the section of country where witness has been the old Maryland line is marked on trees, and every once in a while witness knows of one or two trees that have "M" cut on them, and he takes it that that is what it is for; he does not know. The lines were well marked lines in a good many places. Along the Crane lands he does not know of any mark that would designate it from any old line, than perhaps it is a better marked line than most old lines. John M. Browning has control of the land in Maryland East of this Crane land. Witness does not know whether he owns it or not. Witness never surveyed any of the Maryland Military lots, and does not know whether the Crane land borders on the Maryland Military lots along there. Witness recognizes the patent from the Commonwealth of Virginia, dated January 31st, 1859, to Jacob Crane for 514 acres as part of the land surveyed by him for William B. Crane's estate, and, looking at Map No. 1, prepared by Mr. Monroe in this case, witness believes this 514 acres is properly located; has no doubt about it. As located, it would be within the lines of the W. B. Crane heirs' lands. The balance of the Crane lands, not included in the 1247 acre patent, or the 514 acre patent, lie West and North from these tracts and adjoin them and extend to what witness knows as the Messenger tract, Northward, a mile or

more. Witness knows personally that part of these Crane lands were assessed for taxes in Preston County, West Virginia, and he believes all of them have always been so assessed, and the taxes paid in Preston County, West Virginia. He feels absolutely sure of it so far as a man can be. Witness had control of about 900 acres of these lands for some four years, and the taxes were paid on them in Preston County, West Virginia. Witness had control of three or four small tracts—odd pieces, which were left after the other lands were sold, extending from the Maryland line beyond the Brown line, and it was upon these lands that he paid taxes for the Cranes in West Virginia, or rather for a later owner by the name of Wardwell. Witness paid the taxes from '81 to '85 to the Sheriff of Preston County. These lands were not assessed by the Maryland authorities. The State of Maryland exercised no jurisdiction over this Crane land. Witness knows where the Brown line was run in '97. He never knew of any State line to be claimed in that neighborhood before it was run by Mr. Brown. The oldest residents of Preston County never heard of it, so far as witness has heard. He has talked to some pretty old ones. His father is eighty-one years old. In all of his surveying in that section witness never knew of any one claiming under a Maryland title called "Nonpariel."

On cross-examination witness testified that he does not know where the Dunkard Glades, or Dunkard Bottom is; that the Burchinal road does not run to Dunkard Bottom, to his knowledge, and he does not know where the Western terminus of that road is. He does not know where it starts in Maryland, only knows it probably three or four miles beyond the old Maryland line,—after you pass over what is known as Snaggy Mountain. He has not surveyed on the Maryland side. On the West Virginia side the road runs pretty near to the top of the mountain over Greggs Knob toward Cheat River. There is a Burchinal road way up in Valley District, but he does not know whether it is the same road. It is West of the Cheat River. He does not know where the old road crosses the Cheat; doesn't know whether it crosses Dunkard Bottom or not. It is a fact that the courses and distances in the old Crane deeds carried up to what witness knows as the old Maryland line. It is a fact that the Eastern boundary of those deeds runs to that line, but that is not the way witness came to know the old Maryland line. He knew

it before he surveyed that land. He had seen the old Maryland line down in the DeBerry neighborhood, between the DeBerrys' and the people living on the Maryland side. Mr. Glover owned a piece of land that he knew of, and between the Ward heirs. It was what witness knew as the old Maryland line. He does not know who ran it; don't know of anybody that ran that line, and don't know that that was the line he ran, because I was not with anybody. The deeds call for this line, known in the neighborhood as the old Maryland line. The Crane deed there calls on one side of it for a line that ran North and South with the Maryland line. That old deed that I have got here calls for that. It reads:

> "To a chestnut on the south side of the Burchinal road, and on the Maryland line as run by Reuben Morris, and with the Maryland line south 204 poles to pointers on said line and to intersect a line run due East from the beginning of this deed."

This is read from a deed made from John Hoye to Jacob Crane, dated the 10th day of August, 1846. Reuben Morris was an old surveyor of Preston County, West Virginia. Never heard of his running a boundary line between the State of Maryland and the State of Virginia

Re-direct Examination: The old Maryland line, as witness knows it and as it is now known in the neighborhood along through Preston County, and as witness ran it different places, quite a good many places in fact, is the same line and the only old Maryland line that he ever heard of. There is a reputation and tradition in that neighborhod amongst the old people and the understanding with all the people that witness talked to, that that was the Maryland line. Well, now, you take for instance old Joseph DeBerry, who has been dead for years, and Samuel DeBerry and William B. Crane and all those people—they recognized that as the Maryland line. I knew them years ago, and also this man Baker, who is dead. He was the county surveyor; also Reuben Morris and Buckner Fairfax, they were surveyors in this county for years, old men, and have been dead for years—they all recognized it as the Maryland line. The Eastern boundary of the Ward lands, on the Maryland line, coincides with and is one and the same line as the line of these Crane lands, one continuous line, and also the Hoye lands.

Recross-examination: Witness was not with Mr. Monroe when he located the line for the State of West Virginia in this case. He does not know whether the line which he has spoken of as the old Maryland line is the same line that Mr. Monroe located. Witness states that he will make an outline map of the W. B. Crane lands, showing their situation with reference to the Maryland line and the Burchinal road and lands lying South of them, to be filed with his deposition, marked "Elliott Exhibit No. 2", and also showing the Michler line, but the Brown line he knows nothing about and has never been on it. (Note: This outline map, made by witness A. J. Elliott, and marked "A. J. Elliott Exhibit No. 2," is found on page 1774.)

H. J. Freer testifies (page 1616 Record) that he is forty-two years of age; resides at Oakland, and is a land agent and civil engineer, and has been connected with the Preston Lumber & Coal Company for a period of twelve years, as land agent, surveyor and civil engineer. He is very familiar with the Kunkle tract, which was owned by the Preston Lumber & Coal Company, and has traced all its lines, surveyed it out and made a plat of it in 1901 or 1902. The Preston Lumber & Coal Company got the land from Mary Kunkle in 1891. Witness was not connected with the Company at that time, but has been working with it since 1894. The Company still owns that land. Witness made the map filed with his testimony marked "Freer Exhibit A" after he had completed the survey of the Kunkle lands. (This is the second map found after page 1774). Witness did not put the patent lines on the map, but simply made the outline map and prepared a second map with the patent lines on it, and this map was placed over this Exhibit A, and the patent lines traced over it. These patent lines are correctly laid down on the map. The Hoye patent of 500 acres is correctly laid down in its relation to adjacent lands and in relation to the Michler line and the old State line. He cannot recollect whether this Hoye patent calls to run with the Maryland line. (Note: A copy of this patent is found on page 1783 of the printed Record. It grants "a certain tract or parcel of land containing 500 acres, lying and being in the County of Preston, on the waters of Youhogany River—adjoining the Maryland line and extending West to the lines of a survey of Francis and William Deakins" and in the

courses and distances given, it calls, among others, to run "to a chestnut stump and pointers, the beginning of William Ashby's survey of 200 acres, near Henry Lawers N 88 1-3 E 12 poles to the Maryland line, and with it S 198 poles to a stake in a line of William Ashby's survey of 300 acres, and with it N 51 W 13 poles to the beginning." It is dated March 30th, 1843). Witness cannot recall why he located the Hoye 500 acres as far over as the Old Deakins State line, or remembers that he had the old patent with him at the time he made the location; whether the old patent papers called for the State line, or whether it was pointed out to him by old residents, he cannot remember. The Michler line he was able to locate by the cutting of the timber and he has seen the monuments on it. There is a large chestnut stump with a locust stake in it, standing at the Northeast corner of the Hoye patent of 500 acres. The Eastern line of that tract was about 210 rods. South of this Hoye tract is the Ashby 300 acre survey. The next tracts North are the Elizabeth White and the Miller—Benjamin Miller. They come, witness thinks, from the Hooker tract. The Elizabeth White is part of the Ashby 200 acre survey. Witness has marked Ashby on the plat East of these lands in Maryland. He does not know the name of the patent. Looking at Map No. 1, prepared by Juilus K. Monroe in this case, the land of the Preston Lumber & Coal Company is correctly laid down with reference to the adjacent tracts and the Maryland boundary line as he understands it and has surveyed it, and the John Hoye 500 acres is correctly laid down.

The Preston Lumber & Coal Company's land extends East of the Michler line about fifty rods, between fifty and sixty. The chestnut stump which he has spoken about is designated on Monroe's map No. 1 by "C. 1"; the corresponding point on the map of the Preston Lumber & Coal Company is also designated in the same way—"C. 1." These lands have been assessed in Preston County, West Virginia. for taxation ever since they were acquired by the Preston Lumber & Coal Company in 1891. Witness knows this by having had charge of the payment of all taxes. None of these lands have been assessed in the State of Maryland. Witness knows where the Brown line is, run in 1897. It runs through these lands of the Preston Lumber & Coal Company, about a mile and a quarter West of the Michler line,

Prior to that time witness had never heard of any Maryland State boundary line being in that locality.

On cross-examination witness testified that as land agent and civil engineer of the Preston Lumber & Coal Comapny he had purchased the timber from a tract of land called "The Re-survey of all the Chances", which is a Maryland patent, from D. E. Offutt of Oakland. Offutt sold the timber off of this tract up to the Michler line. He also bought timber off of land owned by Mr. Bitner and from the Wilson Lumber Company. The tract of land purchased from the Wilson Lumber Company is known as "Troas Re-survey," derived from a Maryland title. The timber on this tract was also bought up to the Michler State line. The Bitner land was out of a Maryland tract called "Covent Garden."

On re-examination he testifies that this Offutt timber was purchased in 1902 or 1903, and it lies opposite the Benjamin Miller property on the West Virginia side. The Miller estate claims to the Deakins line. Offutt sold to the Preston Lumber Company on the land between the Deakins line and the Michler line claimed by the heirs of Benjamin Miller. This land between the lines is claimed by Miller and also by Offutt. The Wilson Lumber Company timber, which was purchased by the Preston Lumber & Coal Company, lies directly North of the Backbone Mountain for a distance of two miles. On the West Virginia side the land is owned by the heirs of J. W. Stalnaker. The Preston Lumber Company purchased the timber on this Stalnaker title, so that they own the timber on both sides of the Michler line; therefore no question can arise by the Preston Lumber & Coal Company against itself as to the ownership of the timber between these lines. The timber from the Wilson Lumber Company was bought in '96; from Stalnaker in 1895, and from Bitner about the same time. The timber opposite Bitner on the West Virginia side of the Michler line was bought from the Stalnakers, so that the Preston Company owns the timber on both sides and there can be no conflict as to that timber growing out of the Maryland State line. The Preston Lumber & Coal Company purchased land from Mrs. Mary Loar. It lies in Preston County, West Virginia. A deed was made by Mr. Loar to the Company. They first purchased the timber and then the land itself, purchased the timber about 1901 from

Isaac McDonald, who had a contract with the Loars, and then they purchased the land outright from Mrs. Mary Loar about 1904. This was a tract patented to or owned by D. H. Loar for 1266 acres. It lies in Preston County, West Virginia, just North and West of the Backbone Mountain along the old Deakins State line. Witness has surveyed the tract and run it by the old Deakins line. The Company had previously bought from the Wilson Lumber Company the timber on this land under the Maryland title on the East side and on the North side of the Backbone Mountain East of the Michler State line; that is, the portion where the two adjoin.

Joseph Rembold testifies (page 1876 Record) that he is sixty-one years old; lives in Preston County, West Virginia, in the Southwestern part, Union District, about five miles from the Fairfax Stone; knows where the Brown line was surveyed in 1897. It ran through his farm on top of the hill. He owns 200 acres; got it from his father, Henry Rembold, and has owned it for forty-one or forty-two years. His father owned it something like fifteen years. His father is now dead. He has lived on the land ever since he has owned it. A. W. Wilson improved part of the land before he got it. His father got the land from Christian Wiles. Wiles got it from a man named Rudolph—Samuel Rudolph. He does not know what originial patent covers this land. The title is held in West Virginia. It has been assessed for taxes in West Virginia; none of it in Maryland. Before the Brown line was run through it, witness had never heard of a boundary line in that locality. There was a line surveyed and cut out about a mile and a quarter East of his place. Witness gives the names of the people who live between the line run by Mr. Brown in 1897 and the old State line, as he remembers it, as follows: Herbert Evans, R. E. L. Breedlove, on the East; Taylor Paugh, I. W. Shaffer, A. C. Winters, John Slaubaugh, Raymond Winters, Edward Winters, on the North; E. E. Rembold, Martha Winters runs up to the line probably; Elijah Bachtle, Creed Stemple, Sophia Wolfe, Fred Slaubaugh, Eli Slaubaugh and Charles Shank. That runs about a mile North of witness's place, and not more than one-half a mile South of it. James George, Annie Hollan and George Parks live South. These people vote at Eglon, Union District, Preston County, West Virginia, at elections held under the authority of the State of West Virginia. Witness votes there himself and has seen them there at the election. Their lands are assessed for State taxes in West Virginia, the school

house is at Horse Shoe Run, Northwest of witness's house, and the children of the people living between the lines he has mentioned attend the West Virginia schools. The roads running East and West are worked under the authority of the State of West Virginia to what they call the old Maryland and West Virginia line, a mile and a quarter East of the line run by Mr. Brown. He has never known any jurisdiction to be exercised by the State of Maryland between those lines; has not seen the old line run. Mr. Monroe ran his line about a mile and a quarter Eastward of the Brown line. He does not know the exact place. He knows the old line in places. By the line that was surveyed and cut out, witness means the old line. He does not know who surveyed it and cut it out. It was before he came to that country in 1865; does not know where the Michler line is.

Jacob Slaubaugh testifies (Record, page 1878) that he is fifty-three years old, resides in Preston County, West Virginia, Union District, in the South part of the County on the West side of Backbone Mountain. He owns 108 acres of land; has owned it about thirty-five years; bought it from Enos Sell, who got it from Henry Slater. He bought off the Deakins survey of which it is a part; does not know the quantity of acres in the old original Deakins survey. This land has always been assessed in Preston County, West Virginia; never in Maryland. The Brown line, in 1897, was run through a part of his land. He never heard of a line in that neighborhood before that. He always understood the line that was cut out to be the old line. It is a mile and a quarter East of his place. He used to see a rock monument on the line from his place. A reference line was run, he thinks by Mr. Monroe, in 1894, he thinks a few rods East of the line on which the monument stood. Witness has lived in that section about thirty-five years; was raised where his brothers live, on the old home place three miles Northeast of where he now lives on the old Maryland line. His brothers are Eli and Frederick Slaubaugh. They live on the old home place. Their land was assessed in the State of West Virginia, and extended to the old line. Witness gives the names of the people he can recall that live between the old line and the line run by Mr. Brown, as follows: Henry Holland, John Sparks, James Gorge, Lee Breedlove, Taylor Paugh, Herbert Evans, A. C. Winters, Raymond Winters,

Isaac Shaffer, John Slaubaugh, Charles Winters, Edward Winters, Edward Rembold, George Hauser, Sophia Wilt, Creed Stemple, Elijah Bachtle, Eli Slaubaugh, Fred Slaubaugh, O. Hampstead, Charles Shank and Charles Jones. That carries you Northward about three miles. There are no persons South of witness between the line run by Brown and the Fairfax Stone. The people above named vote at Eglon, Preston County, West Virginia, under elections held under the jurisdiction of the State of West Virginia. Witness votes there himself. His land is assessed for taxation in West Virginia and the other people he has mentioned pay their taxes in West Virginia. They work the roads under the authority of West Virginia in that section. The public schools are maintained in that section by West Virginia. He has never known any jurisdiction in that section to be exercised by the State of Maryland. Witness knows where the stone was planted by Mr. Brown near the spring on Backbone Mountain; has been there since the stone was planted and before, often; never heard a name for that spring; has been to the Fairfax Stone; was first there some forty years ago when he was a boy; went with his father and some neighbors. They took cattle there. His father told him it was the Fairfax Stone. It was since the War. He remembers when the Michler line was run in 1859. There was only one line. It was cut out wide. There was another line along there, known as the Maryland line, before the Michler line was run, but he does not remember any other line. That is the line he knew as the Maryland line.

U. N. Orr testifies (Record, page 1769), that he is seventy-four years old; was the assessor appointed by the Governor to re-value the lands in Preston County in 1905. He re-assessed the lands in the Eastern part of the County along the line of Garrett County, Maryland. That assessment was incorporated in a book, one of which was returned to the auditor, one to the State Tax Commissioner and one to the Clerk of the County Court of Preston County. The Clerk is George A. Walls. Exhibit No. 69, filed with the testimony of Julius K. Monroe, found in the printed Record, pages 1865 to 1871, both inclusive, is a list of the lands lying along the Eastern border of Preston County, adjoining the Maryland line. Witness marked these lands on the land book of Preston County, and this was copied from the tracts marked by him. Witness knows a good many of the people who live along in

that section of the country; was all through there when he made the assessment, and formerly owned about 1500 or 2000 acres right on the line. He recognizes in this list the names of the people that live along that territory. From the knowledge that he gained of the different tracts of land along that section of the county, in making the re-assessment and in other ways, he recognizes a majority of the tracts of land in that list as tracts lying along that line in that section. There might have been some small tracts that no owner lived on. The land was formerly on the old land books. These tracts were on the old land books.

Result of this Evidence.

This and other evidence in the case shows, beyond all question, that this country extending from the Backbone Mountain to the Pennsylvania line, and between the Michler line and the new Brown-Potomac line, has been settled up for a great many years, the number of residents owning farms, according to this abstract, being between one hundred and one hundred and fifty. There are the villages of Corinth, Cranesville and other hamlets, the names of whose inhabitants are not given. All these lands are held under Virginia titles, have been assessed in Virginia and West Virginia for taxation; the public roads and schools are maintained by Virginia and West Virginia authorities, and from the earliest time the States of Virginia and West Virginia have exercised complete and exclusive jurisdiction over this territory. The State of Maryland has not attempted to exercise any jurisdiction over any part of this territory. We are dealing now only with the territory West of the Michler line; the territory between the Michler line and the old State line will be discussed more fully hereafter. But West of the Michler line there is no question, we believe, as to the fact that Virginia and West Virginia have had exclusive control and jurisdiction over the territory from the earliest time. The State of Maryland has offered no evidence to the contrary. The only evidence of any kind that indicates that Maryland ever attempted to set up any claim to this territory are several old grants or patents, which were issued, running over into this territory.

Old Maryland Grants West of Michler Line.

In this cause the State of Maryland has had her surveyor, Brown, locate several of these old grants, and it is important that

the facts in regard to these grants should be clearly understood by the Court. These grants are shown on Mr. Brown's Map No. 1, as follows, going North from the Fairfax Stone: Royal Charlotte, Kindness, Ashby's Cove, Thomas & Ann, Nonpariel, The Diadem, Elder Spring and Cherry Hill. By an examination of the patents for these several tracts it will be found that the surveys, upon which the grants are founded, were all made prior to the running of the Deakins line in 1789. Some of the patents may be dated after that date, but the surveys had all been made prior to that time.

The "Royal Charlotte" patent was granted to Thomas Hall, May 14th, 1787. (Record, page 660). It is based upon a survey made April 12th, 1774.

The patent for "Kindness" was granted to Baker Johnson, October 23rd, 1793, (Record, page 692), but it is based upon a survey made April 30th, 1774.

The patent for "Ashby's Cove" was granted to Thomas Hall, assignee of Samuel Chase, May 14th, 1787, and is based upon a survey made April 13th, 1774.

The patent for the tract called "Thomas & Anne" was made to Thomas Johnson, December 6th, 1786, and is based upon a survey dated April 9th, 1774.

The tract called "Nonpareil" was granted to Jonathan Boucher, September 29th, 1786, based upon a survey made September 5th, 1774. (See Record, page 964.)

"The Diadem" was patented to George Robbins Hayward and Thomas Hayward by the State of Maryland, December 3rd, 1791, founded upon a survey, however, dated April 11th, 1774. (Record, pages 704 and 954.)

The tract "Elder Spring" was granted to Francis Deakins, assignee of William Deakins, February 15th, 1786, based upon a survey made for William Deakins April 26th, 1774. (Record, pages 725 and 955.)

The tract "Cherry Hill" was granted by the State of Maryland to William Deakins, assignee of Brooke Beall, February 15th, 1786, based upon a survey made April 25th, 1774. (Record, pages 788 and 956.)

It will be observed that the surveys upon which all these grants are founded were made in the year 1774.

It seems that by a proclamation issued by the King of Great Britain in the year 1763, the Colonial Governments were prohib-

ited from granting any lands or making settlements West of the sources of the heads of any of the rivers flowing into the Atlantic from the West or Northwest, and it is admitted in the answer of the State of Maryland in this case to the cross-bill filed by the State of West Virginia that partly on account of this proclamation of the King, the proprietary and authorities of Maryland suspended the prosecution of their claim to go to the head of the South branch of the Potomac prior to the Indian Wars. (Record, page 523.) After these Wars were over Maryland appointed Commissioners and had a survey made of both branches of the river and paid the expenses of it. The answer states (Record, page 525),

> "That after the meridians were run and plotted by the said Thomas Cresap, as aforesaid, the Western lands still remaining unsettled, the proprietary continued his former order, making the reserve and prohibiting surveys and grants of land Westward of Fort Cumberland, in obedience to the King's proclamation issued, as aforesaid, and to avoid giving any offense and to avoid disputes with the crown, and Lord Fairfax in relation to the line settled between them, until a favorable opportunity should occur of bringing the matter and location of his Western boundary to the first fountain of the South branch, as aforesaid, before the King in council; that afterwards, *in March, 1774*, the said Board of Revenue took off the reserve and passed a resolution that surveys and grants of land Westward of Fort Cumberland might be made and opened a land office for that purpose, and several persons, availing themselves of this privilege, obtained warrants and made surveys of land not only to the West of Fort Cumberland, but located their warrants Westward of the meridian line drawn from the head of the North branch of the Potomac River and to the Westward of the Allegheny Mountains."

These proceedings were opposed by the agent and receiver-general of the proprietor of Maryland, and it appears that, although the Board of Revenue did not withdraw this permission, yet, evidently, the further granting of such warrants was stopped after 1774. No surveys were made West of the meridian of the Fairfax Stone under the authority of Maryland after 1774. So that it is clear that for more than one hundred years prior to the beginning of this suit no survey of land was made, or attempted to be made, by the State of Maryland, West of what is known now as the Michler line.

THESE OLD MARYLAND GRANTS ARE COVERED BY VIRGINIA PATENTS AND THE LANDS HAVE BEEN HELD UNDER VIRGINIA TITLES.

Royal Charlotte.

The Southwestern part of the Royal Charlotte, lying West of the old State line, or Deakins line, is covered by a patent issued by the State of Virginia to John Turton Goff, dated June 26th, 1787, based on a survey dated November 16th, 1782. (See Record, page 1776.) The description is as follows:

> "A certain tract or parcel of land containing 1000 acres by survey bearing date the 16th day of November, 1782, lying and being in the county of Monongalia on the headqaters of Yohogania river, joining the lands of Zarah Osborns, and John Petty, John, and bounded as followeth, to wit: Beginning at a white oak corner to Zarah Osbourns & John Petty John & running with Pettyjohn's lines E 28 poles to a white oak No. 52 degrees E. 44 poles to a white oak N 178 poles to a maple N. 21½ degrees E. 72 poles to pointers N. 34 poles to a hickory S. 70 degrees E. 68 poles to a red oak S. 40 degrees E. 20 poles to a cherry tree on a branch of Yohogania S. 80 degrees E. 34 poles to a cherry tree S. 47½ degrees E. 78 poles *to a white oak in the Maryland line* corner to the said Pettyjohn's *thence N. with the said line 409 poles to a white oak* S. 70 degrees W. crossing Yohogania 520 poles to pointers corner to said Goff's other survey thence with said line S. 26 degrees E. 484 poles to pointers corner to the aforesaid Osborns & with his line, the same course continued 508 poles to the beginning with its appurtenances."

This description calls for a white oak in the Maryland line, corner to the said Pettyjohn. This white oak is designated on Map No. 1, made by Mr. Brown in this cause, by the letters "W O," at a point marked red "B 6," and on Monroe's map No. 1. It is clearly shown that this Goff patent of 1000 acres covers all the Southwestern portion of the Royal Charlotte, which lies West of the State line, as claimed by the inhabitants along this locality, and corresponds closely with the Michler line.

The other portion of the Royal Charlotte, lying West of this State line, is covered by the patent for 868 acres, granted to John T. Goff by the Commonwealth of Virginia June 26th, 1787, based

upon a survey dated December 24th, 1782. This survey is found on page 1777 of the Record, and is located on Mr. Monroe's Maps Nos. 1 and 2. It clearly appears from this location, especially from Map No. 2, that this Goff patent of 868 acres covers all that portion of the Royal Charlotte, lying West of the Michler line, except the part covered by the Goff patent of 1000 acres, above mentioned. These lands are held by Silas Fike, Beckman, J. C. Dawson and D. E. Offutt under these Virginia patents. Their Eastern boundaries correspond with the Eastern boundaries of these patents, as located by Mr. Monroe. Mr. Monroe located these patents, first from the Pettyjohn survey of 330 acres, the corner of which was pointed out to him by John Slaughbaugh, who remembered where the orinigal cherry stump, called for in the Pettyjohn patent stood and then the other Pettyjohn survey for 400 acres was laid down by its relation to the first one The corner of the Offutt land was pointed out by Lloyd Dawson, who lives on it, and then they were also laid down with reference to the location of the Royal Charlotte as made by Mr. Brown, as well as Military Lots 316, 317 and 318, all of which are located by Mr. Brown on his map. The junior patents calling for the Elder, are laid down according to their common corners and calls with reference to each other, as fully explained by Mr. Julius K. Monroe in his testimony found on pages 1639 to 1645, inclusive. If the location of the Royal Charlotte and the Military lots 316, 317 and 318 by Mr. Brown is correct, then the location of these surveys by Mr. Monroe is also correct, because, as we have stated, there are calls for these Maryland surveys and lots and common lines and corners between them and the other Virginia patents, the location of which is fixed as shown by Mr. Monroe.

Kindness.

There is only a narrow strip of the Maryland tract called "Kindness," which extends West of the Michler line, but, so far as it extends West of that line, and, in fact, so far as it extends West of the old line claimed by West Virginia in this case, it is covered by Virginia patents as shown on Monroe's Map No. 2. The patents that cover that portion of Kindness, lying West of the Michler line, are the patent to Francis and William Deakins of 908 acres, dated December 2nd, 1785, according to a survey dated July 30th, 1784, (Record, page 1851); and also a patent to Francis and

William Deakins for 350 acres also dated December 2nd, 1785, according to a survey dated April 30th, 1784. (Record, page 1852); also a patent to Jesse Ashby for 400 acres, dated March 18th, 1784, according to a survey dated June 12th, 1783. (Record, page 1850. It will be noticed that all of these Virginia patents are older than the patent for Kindness. It is dated October 23rd, 1793. The two Deakins patents are dated December 2nd, 1785, and the Jesse Ashby patent March 18th, 1784. The survey for Kindness was the earliest, it being dated December 16th, 1774. That portion of Kindness not embraced in the three Virginia patents above mentioned, which lies between the Michler line and the old Virginia State line, is covered by two Virginia patents, one to H. White, for 47 acres, dated March 1st, 1852, according to a survey dated May 4th, 1850 (Record, page 1853); and the other patent to ———— —— ——— Bacorn for 500 acres, dated May 18th 1793, according to a survey dated May 19th, 1788 (Record, page 1525). This Bacorn patent extends down East of the Jesse Ashby 400 acres, as shown on Monroe's Map No. 2. This Bacorn 500 acres patent also covers that portion of the Maryland patent called Thomas & Anne, which lies West of the old Deakins line. Mr. Monroe, in his testimony, pages 1694 and 1695, states how these surveys were located. This land has always been held under these Virginia titles. It lies along the Maryland line South of the Baltimore and Ohio Railroad at Huttons. Mr. Garrett T. White, testifies, on pages 1430 to 1433, inclusive, in regard to the ownership, occupancy and title of these lands. He owns 180 acres, derived from his father and from Israel Baldwin, on which he, himself, has lived since 1858. He lives between the old Maryland line and the Michler line. The Michler line is thirty rods West of his house. The old line is a little East of the line run by Monroe, which latter line is eight or nine rods East of his house. There is a fence marking this old State line, which has been there over forty years. He testifies that the State of West Virginia, and not the State of Maryland, had exercised jurisdiction over all this land since he has known it; that the house in which he lives was built by his father, Henry White, in 1847, and has been occupied continuously since that time, and that John A. Connell owns the land opposite on the Maryland side; that Connell only claims to what is termed the old line, the line East of the Monroe line, the same line to which witness has always claimed, and this line has always been recognized as the State line in that neigh-

borhood since witness has known it. It has always been called the Maryland and Virginia line. He testifies that the Bacorn patent lies North of his lands on the West Virginia side. This Bacorn title is a Virginia patent. Witness has never heard it disputed. It is one of the oldest titles. He heard the surveyor talk about it when he was a little boy. He mentioned those two titles, George Ashby and Bacorn title. The DeBerrys now own that land and claim over to the old original line, which corresponds with the line claimed by the witness.

Similar testimony is also given by William DeBerry, (Record, page 1433.) and Wesley DeBerry, (Record, page 1439) and Isaac H. Smith (Record, page 1445,) and George W. Freeland (Record, page 1448). This Bacorn survey is described in the patent as

> "Lying and being in the County of Monongalia, adjoining the East and North end of Jesse Ashly's survey and *adjoining the Maryland line*, and bounded as followeth, to-wit:
>
> Beginning at a birch tree standing on West side of the State road and running thence, South 40 degrees East 49 poles to a cherry and maple, thence North 20 degrees, East 40 poles to two cherry trees, corner to Jesse Ashley's land, *thence with said Ashley's line East* 116 *poles to pointers; thence South* 308 *poles with another of said Ashley's line to two cherry trees;* thence leaving Ashley's line North 80° East 60 poles to a cherry tree; thence N 600 poles to a service and thorn tree; thence S 47¼ degrees (74¼?) W 243 poles to pointers; thence S 3¼ degrees E 237 poles to the beginning, with its appurtenances."

Jesse Ashley mentioned in this patent is evidently Jesse Ashby, and the survey referred to is his survey of 400 acres above mentioned. It is described in the patent, page 1850 of the Record, as follows:

> "Lying and being in the County of Monongalia on both sides of Snows Glady Creek, a branch of the Yohogania river & bounded as followeth, to-wit: Beginning at a cherry tree on the N side of the Creek, *running thence East* 116 *poles to pointers S.* 308 *poles to two cherry trees on the creek* S. 16½ degrees W. 83 poles to a birch W. 220 poles to a white oak N. 20 degrees E. 408 poles crossing the creek to the beginning with its appurtenances."

It will be seen that the common line between these two patents are the first and second lines of the Ashby patents, East 116 poles to pointers, South 308 poles to two cherry trees on the creek. The Bacorn patent calls for two cherry trees, corner to Jesse Ashley's land; thence with said Ashley's line E 116 poles to pointers, thence South 308 poles with another of said Ashley's lines to two cherry trees, thence leaving Ashley's line, etc.

Ashby's Cove.

By comparing the map of Mr. W. McCulloh Brown, filed in this cause with Map No. 2, made by Mr. Monroe, it will be seen that the same land, which is covered by the Maryland patent for Ashby's Cove is covered by the Jesse Ashby 400 acre Virginia patent above mentioned, and if there is any part of it not covered by that patent, it is covered by the Jesse Ashby 200 acre patent, dated November 5th, 1789, for the other Virginia adjoining patent. This territory adjoins the Baltimore & Ohio Railroad. The village of Corinth is located upon these lands. The testimony in the case shows that this is a West Virginia town; West Virginia elections are held there and the State of Maryland never has come beyond the old Maryland line, as located by Mr. Monroe and claimed by these inhabitants.

Thomas & Ann.

We have already shown that so much of the Maryland tract, called Thomas & Ann, which lies West of the old Deakins line, is covered by the Bacorn patent for 500 acres, dated May 18th, 1783, and located on Mr. Monroe's map, and that this territory has been held continuously and exclusively under this Virginia patent and not under the Maryland patent of Thomas & Ann.

Nonpareil.

Mr. Brown has attempted to make a location of a Maryland tract of land called "Nonpareil," the patent for which is dated September 29th, 1786, but there seems to be no sufficient evidence to justify the location which he has made of this tract. His account of the manner in which he made the location is found in his report (Record, page 964.) The patent is "Exhibit Brown No. 58," found on page 798 of the record. The description in this patent is as follows:

> "All that aforesaid tract or parcel of land called Nonpareil, lying in Washington County: Beginning at three bounded hickory trees, standing on the West side of a hill, 16 perches and one-quarter of a perch on the East side of the old road that leads from the Dunkard Glades to the Dunkard bottom; the above trees standing about Forty perches from a meadow known by the name of Snows Glade about two or three miles from Murleys Glades,"

and running thence simply by courses and distances without calling for any trees or natural objects to the beginning.

Mr. Brown says that he began the survey near some hickory trees standing on the West side of a hill near an old road leading from Dunkard Glades to Dunkard Bottom about forty perches from a glade, and at a stake standing at the end of the forty-sixth line of a tract of land patented by the State of Virginia to Francis and William Deakins on the 22nd day of September, 1789, for 6000 acres.

In his evidence on cross-examination, (page 1064) he states that he did not find any of the original corners of this tract; that he found no bounded hickory trees at the point where he began, that he began near hickory trees standing on the West side of the hill, etc. They were young trees. He found no marked corners of any kind in running the tract. He did not attempt to locate the present holdings within that grant. On page 1065 he says that the way he located the corner was by a call in the Francis and William Deakins patent of 6000 acres, dated September 22nd, 1789. This call is for the beginning of Nonpareil at the end of the forty-sixth line, of this Deakins tract. He first located the Deakins tract and planted a stake at the end of the forty-sixth line, and then ran the Nonpareil from that. This is contrary to all the rules of law in regard to the location of lands. A senior tract cannot be located by a junior, which calls for it.

However, if this tract is correctly located, no one has ever held under it. No evidence is offered that it was ever conveyed by the original patentee to anyone, or that any possession whatever has been held under it. We did not deem it necessary to look up the Virginia patents covering all this territory, but our proof shows that it has all been held and occupied from the earliest time and still is held and occupied under Virginia patents, by citizens claiming allegiance to Virginia and West Virginia. Mr. Monroe

has located two patents, one to Thomas Brown for 490 acres, dated July 1st, 1856, and one to Jacob Crane for 514 acres, dated January 1st, 1859, and on his map No. 2 he has located a patent to Jacob Guseman on a survey dated October 12th, 1848, for 750 acres; and, in his testimony on page 1692, he states that this covers a part of the Nonpareil tract, and he gives his reasons for locating the Brown patent for 490 acres and this Guseman survey for 750 acres, as follows: The Brown survey is described as adjoining lands of David Parsons, Jacob Guseman and John T. Morris, in the line of John Hoye and Honore Martin survey of 3600 acres and as a common line with the Guseman line and Hoye line. He had previously located the Hoye and Martin 3600 acres, and the Guseman and Brown surveys call for beginning at a white oak in the David Parsons line, which point is indicated on his map by red letter and figures "D 19." He also located the Jacob Crane 514 acres by its common lines with the Deakins 6000 acre survey, on part of these lands as shown on his map No. 2, and he has also located the lines of the present holdings in this territory, showing that it is covered by farms held under Virginia titles. The names of the present landowners are given as L. Beatty, Thomas Brown, Jacob Guseman, F. Metheny, Nicholas Lee, Levi May, J. M. Morris, M. H. Taylor and George Smith. And, in fact, the evidence in this case shows that the inhabitants in that section never heard of this Nonpareil tract of land. Mr. D. B. Groves, who lives in that neighborhood about half way between Terra Alta and Cranesville, known as the Oak Grove Settlement, who has lived there for thirty-five years, and whose neighbors, on the North, are John Metheny, M. J. Lee, John R. May and M. H. Taylor, and who gives the names of the land owners in that section, on page 1585 testifies as follows:

> "43rd Q. Do you claim to hold your land under Maryland or West Virginia title?
>
> A. West Virginia.
>
> 44th Q. Did you ever hear of a tract of land patented by the State of Maryland, called Nonpareil?
>
> A. No, sir.
>
> 45th Q. Is there any such tract in your neighborhood that you know of?
>
> A. None to my knowing.
>
> 46th Q. Do you know whether any of the people in that neighborhood claim under a Maryland title?
>
> A. Not that I know of. They do not."

There can be no dispute, therefore, of the proposition that no one has ever held possession of any of the territory within these lines of the Nonpareil under that patent, but that they all have been, and still are, held under Virginia titles.

The Diadem.

The next Maryland grant extending beyond the Michler line, which Mr. Brown has located, is the Diadem, and he has made certain interior locations within the lines of this patent, manifestly for the purpose of leading the Court to believe that persons owning these interior pieces are claiming them under the Diadem title, and that their holdings conform to the exterior lines of the Diadem, but we have shown beyond all question that this territory within the Diadem is also completely covered by Virginia patents. This is made clear by Mr. Monroe's Map No. 2. There is almost a piling of patent on patent in this case, so that it is difficult to distinguish the lines of one from the other. There are three old patents for 400 acres each to Stephen West, covering portions of this Diadem, all dated October 2nd, 1785. The surveys in two of them are dated November 19th, 1785, and the other November 20th, 1785. Then there is another survey to Stephen West for 500 acres, dated October 2nd, 1786, on a survey dated November 19th, 1785, which covers a small portion of the Diadem. These several patents are filed with Mr. Monroe's testimony as Monroe's Exhibits Nos. 17, 18 and 19, found on pages 1797, 1798 and 1799 of the printed record. Mr. Monroe's testimony, as to the location of these patents is found on pages 1660 to 1666. He testifies that the John Hoye and Honore Martin survey of 3600 acres calls for these tracts and has certain common corners and lines. This is shown particularly on pages 1665 and 1666. Mr. Monroe, in his testimony on pages 1691 and 1692 gives the names of the different patents located within the Diadem survey, and his reasons for such location as follows:

> "I have laid down by protraction the John Summers survey of 200 acres, surveyed November 15th, 1835, and patented in 1837, a copy of which patent is filed herewith, marked 'Monroe Exhibit No. 45.' Also a tract of 500 acres surveyed for William Gable January 16th, 1834, and patented to him the same year, copy of which patent is filed herewith, marked 'Monroe Ex. No. 46.' Also a tract of land contain-

ing 520 acres surveyed for Abram Jeffers and others January 15th, 1824, and patented to them in 1826, a copy of which is filed herewith marked 'Monroe Ex. No. 47.' Also a tract of land surveyed June 18th, 1834, for John and Calvin Crane, for 346 acres, and patented to them in 1836, a copy of which patent is filed herewith, marked 'Monroe Ex. No. 48.'

Objection to the location of the patents.

641st Q. How are those patents designated on the map?

A. They are designated on the map by 'John & Calvin Crane 346,' 'John Summers 200', and 'Gable 500.'

642nd Q. Will you give the reasons for locating those patents on the map as you have?

A. These tracts are described with common lines, and as adjoining each other and are located for this reason as adjoining. Also the John Crane 491 acre tract calls for lines of the Gable tract, and the John Crane 776 acre tract calls for lines of the Summers tract, 200 acres."

The patent to John Summers, mentioned by Mr. Monroe, is dated October 21st, 1837, on a survey made November 15th, 1835, and is found on pages 1839 and 1840 of the record. The William Gable survey for 500 acres, is dated September 8th, 1824, on a survey dated January 16th, 1824, and is found on pages 1840 and 1841 of the Record. The patent to Abram Jeffers, William Elliott, John Tremley and Henry Line, for 520 acres, is dated June 20th, 1826, on a survey dated January 15, 1824, and is found on pages 1841 and 1842 of the Record. The patent to John Calvin Crane, for 346 acres, is dated August 31st, 1836, on a survey made June 18th, 1834, and is found on pages 1842 and 1843 of the Record. Mr. Brown, in his testimony on pages 1023 and 1024, describes the manner in which he located this Diadem patent. The location is made from certain cherry trees pointed out to him by John E. Otto and John F. Lewis.

On cross-examination, on page 1052, where he was being asked about the locations he made of tracts extending West of what he calls the Potomac meridian, he was asked whether he ran any tracts of land as they are now held, extending over the new line, and he answers:

"In one case, I did, yes, sir.

Q. What case was that?

A. There are certain sub-divisions of the tract Diadem, patented by the State of Maryland, which extended to and across the Potomac meridian.

Q. Who holds those tracts now—who owns them?

A. I cannot find that from my notes."

He then continues his testimony, starting out evidently with the purpose of making it appear that these several tracts, which he ran out and which are shown on his map, are sub-divisions of the Diadem, but it clearly appears from the cross-examination and from other evidence in the case, that these several tracts, which he calls sub-divisions of the Diadem, were laid out without any reference whatever to the lots of the Diadem, as nearly all of them extended beyond the Diadem, except one or two, which lie entirely within its exterior lines, and these interior pieces in no way conform to the exterior lines of the Diadem. In order that this may be made clear to the Court, we give his testimony in full, found on pages 1052 to 1063 of the Record, inclusive.

"By direction of Counsel for the State of Maryland I located a tract now held by Henry B. Albright beginning the location at a stone marked J. W. M. standing on the south side of a road leading from Cranesville to Henry Albright's Mill, and ran first north 82 degrees west 18 perches; second south 74 degrees west 26 perches; then south 66 degrees west 2 perches; north 29 degrees west 107 perches and 8-10ths; 5th course, south 37 degrees east 54 perches to a large white oak; sixth course, is north 61½ degrees east 13 perches; 7th course, south 63 degrees east, the call being 139 perches corrected to south 63 degrees east 141 perches to pointers shown by Henry Albright, a witness produced on the ground on behalf of the State of Maryland, as the point called for at the end of the sixth line of this deed; 8th. south five degrees east twenty two perches, the call is to a pine and cherry tree of Colonel Joseph Feather's land; this course is corrected to south five degrees east 27 perches and eight links to the above trees; ninth, south 33 degrees west with the call corrected to south 32 degrees 12 minutes west 71 perches and ten links, to the beginning.

Objection by plaintiff to all testimony as to all said subdivisions unless the deed and chain of title is produced.

Q. Now, do you mean that those courses you have

given is a subdivision of the original Diadem?

A. It covers part of the tract Diadem.

Q. Do any of the lines correspond with any of the original lines of Diadem?

A. No, they do not.

Q. It simply lies within the boundaries of the original Diadem as you located it?

A. Yes.

Q. Is all that piece of land, the boundaries of which you have just given, within the Diadem?

A. A small part of it south of the Diadem.

Q. How is that tract marked on your map?

A. It is marked within the lines of the Diadem, and within small and fainter black lines the letters D. N.

Q. Have you the deed of Henry B. Albright containing the courses which you have given?

A. No, I have not.

Q. You have no certified copy of it, have you?

A. Well, I have not.

Q. Did you have when you made the location on the ground, when you did that surveying?

A. Well, the fact of it is in some cases the locations were taken from a deed, and in other cases Mr. Monroe had the notes, that is the fact of the case.

Q. In this particular case did you run the Albright line from a deed, or what?

A. We ran it from what we believed to be the correct courses and distances given in the deed.

Q. I want to know what actual paper you had before you when you made the survey?

A. I cannot say now, it has been too long ago; we have had so many papers in connection with the survey. Of course we aimed to have correct and certified copies wherever possible on the ground.

Q. Well, you cannot speak as to this particular tract?

A. That particular tract I cannot now, no we located the tract to be correct to the claim of the party owning it and living on it, it was within the lines which he claimed.

Q. You do not know, do you, that he traces his title back to the patent from the State of Maryland for the Diadem?

A. The title was derived from Crane, to the best of my knowledge,

Q. Crane had a Virginia patent for that portion of the land, hadn't he?

A. I understand Crane held it under a Maryland patent.

Q. Didn't he have a Virginia patent?

A. I never knew of him having a Virginia patent; maybe he had outside of the lines of the Diadem.

Q. Don't you know that they are Virginia patents that do cover the Diadem?

A. Not for a fact.

Q. You never investigated that question?

A. I never say any paper showing the lines, courses, or anything showing any claim of the State of West Virginia to the land lying on top of that.

Q. Well, how, was this Albright tract the only tract which you located?

A. All that I did, no, I located others.

Q. Will you please locate them?

Plaintiff objects, unless title, or chain of title, is produced.

A. I located a subdivision of Diadem which is marked and indicated upon the plots within finer black lines and designated by the letters D. P. In order to locate this tract, I began at the original beginning of Diadem, marked by the black letter E, upon the plot, and run the reference line north 60 degrees east 54 perches to a stake, which is the beginning of the deed from John Crane's heirs to Joseph Feather, and ran this course and distances and calls as contained in said deed to John Feather as follows: First, north sixty degrees east 120 perches. The call is to a corner of Alpheus McNemar. This call was corrected to northeast 132 1-10 perches to the corner of said McNear's; then with said John McNear's and John E. Otto's line, north 70 degrees west 165 perches the call being to a small red oak, said Otto's beginning corner. This is corrected to north 70 degrees west 160 perches and five links which said corner was pointed out to me by Albert Feather, a witness produced upon the ground on behalf of the State of Maryland, and thence with Nettle Ridge third, west 213 perches to David Wolfe's line, being the line corrected to north 89 degrees and 18 minutes west 217 4-10 perches to David Wolfe's line; then with Wolfe's line, fourth south five degrees west 12 perches, the call being to a red oak and chestnut pointers, corner to Wolfe and Jonathan Wilhelm; thence with Wolfe's lines reversed, 5th, south 28 degrees, fifth, south 28 degrees west 27 perches; south 81 degrees west 60 perches, corrected to north 86 degrees west 61 perches; 7th, south 17 de-

grees west 134 perches, corrected to south 17 degrees 12 minutes west 147 2-10 perches; 8th, north 72 degrees west 47 perches to a mountain ash in Samuel Crane's line, being the call; this was corrected to north 73 degrees 30 minutes west 42 9-10 perches; thence with said Crane's line. 9th, south 5 degrees east 16 perches, corrected to south 5 degrees east 27 perches and 18 links; 10th, line, is south 32 degrees and 12 perches west, the call being 105 perches to a stone marked J. W. E., standing on the south side of a road leading from Cranesville to Henry Albright's, and in his line. 11th line, south 25 degrees east 48 perches; the 12th line is north 74 degrees east 45 perches to the rear of line of lots known on the plot of the village of Cranesville as lots 51 and 49. The following nine lines of said deed are omitted; for the reasons that the lines embraced within them lies wholly outside the lines of the Diadem. The end of the 12th line of said deed is also the beginning of the 22nd line of said deed from which point I ran the 22nd line north 56 degrees east 138 perches to the westermost corner of the graveyard lots, being the call, corrected to 56 degrees and fifty minutes east 138 2-10 perches to the corner of graveyard lots, and at the end of thirty-nine perches and this line that crosses the 8th line of the whole tract called Diadem; thence, 23, south 75 degrees east 14 perches; 24, north 78 degrees east 36 perches and nine links, being the call corrected to north 78 degrees east 35 perches nine links to a stake on the north branch of the Cranesville and Sang Run road, in line with the division fence of J. Wesley Feather, and the heirs of Michael E. Feather; thence 25, south 5 degrees east 96 perches, corrected to south five degrees east 65 perches and eight links to the end of 572 perches, and 20 links on the 8th line of the Diadem; then with the 8th line of the Diadem we ran east 207 perches and 1-5th to the end of said 8th line of the Diadem; then with the beginning line of the Diadem to the beginning of said tract, and from that point by a straight line to the beginning.

Q. Did you run actually on the ground from the end of the 8th line of the Diadem to beginning point of the Diadem at E?

A. No, I did not.

Q. Could you now give the courses and distances of that line exactly?

A. No, I cannot.

Q. Now, this subdivision is marked on your map, designated how?

A. Designated by the black letters D. P.

Q. Is it all claimed by one person at present, or when you ran it in 1897?

A. I cannot say in regard to that; I ran it according to a deed from John Crane's heirs to Joseph Feather.

Q. Now, look at that plat; I notice over near the point marked 23 miles, on the Potomac Meridian. this tract D. P. appeared to run south also of the line of the Diadem; does it in fact so run?

A. Yes, the lines do, that is, the deed by which we ran.

Q. If you followed the lines of the deed, you would there run outside the lines of the Diadem?

A. Yes.

Q. And wouldn't you also run outside the lines of the Diadem on the line running nearly south, east of the point marked Spring?

A. Yes, you would.

Q. That line extends also below the eighth line of the Diadem, does it not?

A. Yes.

Q. You didn't run it out its distance, but stopped at the eighth line of the Diadem; is that correct?

A. Yes.

Q. Then the next line if run by deed would run with the dotted line as you have it on your map, instead of with the eighth line of the Diadem; is that correct?

A. It would.

Q. Then how would the remaining lines of the deed, if run by the deed instead of following the outlines of the Diadem, run?

A. Generally in a northern direction.

Q. Have you anything on the map to indicate how that would run?

A. There are broken lines which show approximately the course of the lines of the deed.

Q. Those broken lines are laid down by protraction from the deed?

A. Yes.

Q. Now, where did you start with the running of that subdivision?

A. Started at the beginning of Diadem, for reference.

Q. You started for reference.

A. Yes sir.

Q. But the real beginning point was where?

A. It calls to begin certain courses and distances from the beginning of Diadem.

Q. Is it at the point where the dotted line strikes the first line of Diadem on the map?

A. Yes.

Q. Now, then, Mr. Brown, this tract D. P. has no line corresponding with any of the exterior lines of the Diadem, except first line, has it?

A. No, it has not.

Q. And it extends outside the lines of the Diadem at the two points indicated in testimony above?

A. Yes, sir.

Q. Do you know who claimed to be the owner of this piece of land in 1897, when you were there, was anybody living on it?

A. According to the agreement concerning the survey, made between us, they were each represented by an engineer, and it was agreed that Mr. Monroe should survey for me at times, and I would survey for him on other occasions. I was not present when this tract was surveyed; I cannot tell who was living on it.

Q. Did you do any other surveying within the boundaries of Diadem?

A. Yes, we located several other tracts which are marked upon the plot in black letters, and the beginnings, courses and calls and distances are in the return.

Q. Take the division marked D. C. What did you run that by?

A. Within the lines containing the letters D. C. in black letters, there are two subdivisions, one of which has not been marked upon the plot; in fact, the dividing line between the subdivisions is not.

Q. Whose subdivisions are they, who are the parties?

A. One was at that time, John E. Otto and the other Edwin Albright.

Q. Now, that portion D. C. has three lines that conform to the exterior lines of Diadem, has it not?

A. There are part of four lines, two full lines, the second and third, and part of the first and fourth—yes, yes, your question is correct, part of the first, second and third lines.

Q. Within the lines, the first line of subdivision, D. P. also conforms to the exterior line of the Diadem, is that correct?

A. Yes.

Q. Now, those lines, that is the first line of the division D. P. and the first, second and third lines of D. C. are east of the western boundary of the Military Lots just above them, are they not?

A. Not wholly.

Q. Well, practically so, are they not?

A. They are in part east.

Q. Well, what part is not east?

A. I cannot state that.

Q. Now, are they not all east of what is known as the old State line?

A. I do not know of any old State line there; I was not shown any old State line.

Q. If you draw a line *die* south in extending the western line of lot No. 1462, as laid down on your map, will not that line leave that first, second and third lines of subdivision D. D. to the east?

A. It would, yes.

Q. And wouldn't it leave nearly all the first line of subdivision D. C. to the east?

A. It would leave at least half of it.

Q. Wouldn't it leave a good deal more than half of it?

A. Yes, it would, according to the plot.

Q. Take the subdivision D. D., adjoining D. C. on the west, what did you run that by?

A. Why, I run that by a copy of a deed.

Q. What deed?

A. Deed to Ethball Falkenstein.

Q. Do you know who it was from?

A. I do not know who the deed was from; I didn't find it.

Q. That deed didn't lie wholly within the Diadem, did it?

A. My understanding was that it did; that it was a deed, that it was derived from John Crane—not directly.

Q. Didn't the courses and distances extend above the northern line of the Diadem if run out?

A. I don't think it did extend beyond the lines, not to my knowledge.

Q. What are those dotted lines?

A. Those dotted lines on the map are reference lines.

Q. Now, take the tract D. E.; what did you run that by?

A. I ran that by a deed to Henry Roach.

Q. From whom?

A. I have not got the record from whom.

Q. Now, do the lines of that deed lie wholly within the Diadem?

A. They do as far as I know.

Q. Well, as far as you know.

A. Well, as far as my record shows, they do.

Q. Do you know anything about who Henry Roach is?

A. No, I do not.

Q. Have you anything to show the date of that deed?

A. I have not in the record before me.

Q. Have you anywhere?

A. Probably I have it here; I will look. I do not find a copy of the record, but the tract was run according to an abstract of the deed.

Q. Did you take it from the deed, or was it furnished you?

A. It was furnished me.

Q. You cannot speak as to its correctness?

A. No, I cannot.

Q. Now, according to the way you ran this tract D. E., none of the lines as given you would extend beyond the exterior lines of the Diadem?

A. They do not.

Q. What did you run the tract D. F. by?

A. I ran that by an abstract of a deed to David Wolfe.

Q. Do you know who that was from, that deed?

A. No, I have not the record.

Q. Now, did any of the lines of that deed extend beyond the exterior lines of the Diadem?

A. They do not, as given to me.

Q. What did you run G. H. by?

A. I have no record of running D. H.

Q. Do you mean that it was not run?

A. No, I do not mean that it was not run, but I have not the record here.

Q. Was it run?

A. It was run upon the ground, yes.

Q. Where is the record of it?

A. I have not—it has not been included in these returns.

Q. Have you it in your surveyors note book which you used?

A. I might find it in my note book.

Q. If you run it you have it in your notebook, have you not?

A. I should have it, yes. I canont find the record of D. H.

Q. Please give us the notes of D. F. as you have it in your note book?

A. I began at a stone shown me by David Wolfe and ran north twenty three degrees east fifteen perches; south 64 degrees east 15 perches; south 64 degrees east 12 perches; south 55 degrees east 95 perches; north 28 degrees east 7 perches; north five degrees east 33 perches.

Q. Is there any call for objects in the calls?

A. There is a call at the end of the fourth line, for a red oak.

Q. Proceed?

A. The sixth line, north 54 degrees east 40½ perches; 7th, north 38 degrees west 172½ perches.

Q. Now, wouldn't that line take you beyond the exterior boundary of the Diadem surveyed that distance?

A. Well, I cannot say from the map; I do not remember whether that line crossed the fifth line of the Diadem or not; I have no record to that effect.

Q. Well, then, go on with the other calls?

A. Those are all the calls I have in the notebook.

Q. Do I understand that those were all the courses that were run?

A. Those are all I have recorded in this place.

Q. What is the fact, as to whether you ran the outlines or not of the tract D. F.?

A. The 5th line of the Diadem had been run and notes taken to the stone pile that is referred to at this place.

Q. Then Mr. Brown, is it not a fact that the sixth line of the tract D. F. would have extended beyond the fifty line of Diadem but that you in surveying stopped at that line and then made your plot to conform to the line of the Diadem, and ran the other lines of the tract D. F.?

A. I do not know, but know the line extended beyond the fifth line of the Diadem, do not know whether it did or not; I didn't actually run any of the lines beyond the 5th line of the Diadem, outside of it.

Q. Don't your notes show whether you stopped in running the sixth line short of the distance?

A. No, they do not.

Q. What scale is your map on?

A. One thousand feet to the inch.

Q. Now, will you take your rule and measure the sixth line of the tract D. F. as laid down on the map, and state how many poles it is?

A. It is about 120 rods long, according to the scale on the map.

Q. And the call is for what?

A. 172.

Q. So that if the distance were run out it would run some 52 rods beyond the fifth line of the Diadem?

A. It would run beyond the line of the Diadem.

Q. Now, can you find the notes of your actual running of D. E. in your notebook?

A. I have those notes.

Q. In your notebook, I mean?

A. Yes, sir, taken from the notebook.

Q. Please refer to what you have in the note book?

A. Well, it is almost impossible to give it at once from the notebook, because in running those subdivisions we ran some of the lines of the tract, and then continued on the exterior lines of the Diadem, and then concluded the other lines of the first tract by subsequent surveys adjoining, so that the notes are not consecutive always in the notebook, and it will take sometime to study them out and give it on this paper, I have the survey as compiled by the several lines run.

Q. Please give us what you have in your notebook as to the running of tract D. E. just as it is in the book; at what point was the survey of the tract D. E. begun?

A. The second course is north 30 degrees east 46 perches; third course is north 25 degrees west on that line; I ran 21 perches and 20 links to Salt Block Run, and in all 37 perches and 22 links to the Diadem line.

Q. Well, now, did that take up the whole distance of the line called for?

A. I have not—I cannot say whether it did or not.

Q. Isn't it a fact that the call of that line is north 25 degrees west 158 perches, crossing Salt Block, running to the stone pole or a large rock on Fike's Hill?

A. I cannot state.

Q. Well, if that is the call, then you fell very much short of the distance, didn't you?

A. I did.

Q. And that call would carry you very far beyond the exterior line of the Diadem?

A. Yes, sir.

Q. Now, is there nothing in your notes to indicate whether you stopped short of the distance or not?

A. No, I could not tell you, I have got nothing to show; it shows I have stopped at the Diadem line.

Q. Now, Mr. Brown, where are these papers that you ran by?

A. Well, as I stated, I took some of the courses and distances from deeds and I got some of the abstracts from Mr. Monroe.

Q. Where are they now?

A. Well, I think in some cases Mr. Monroe had the copies with him, and in some cases I got them of him.

Q. Do you know whether this particular tract D. E. was one that you got from Mr. Monroe?

A. No, I cannot say.

Q. Nothing to indicate?

A. No.

Q. Now, do you adhere to your former statement then Mr. Brown, that the lines of that tract D. E. if run by the calls of the deed would conform to the exterior lines of the Diadem?

A. No, that evidently was wrong; I said at the time to the best of my knowledge they would be; if these calls are as you read them, they would extend beyond, undoubtedly.

Q. Now, going to D. H. Do I undrstand that you have no record of running that?

A. I have not the notes of the running of D. H.

Q. Where are they?

A. They are mislaid somewhere; I have not got those.

Q. Did you run the tract?

A. We ran what was within the lines of the Diadem, yes.

Q. I notice that you have extended dotted lines, conforming to D. H., beyond the exterior lines of the Diadem. Do those dotted lines represent the lines of the paper first given to you?

A. They do to the best of my knowledge.

Q. So that that tract would not conform in its exterior lines with the exterior lines of the Diadem?

A. Not as laid down on the plot.

Q. The same is true of tract D. N. is it not?
A. Yes sir: yes sir.
Q. It extends south of the Diadem?
A. Yes sir. part of it does extend south.
Q. Now what about D. K. Have you the running of that?
A. Yes, I think so.
Q. What did you run that by?
A. We ran it by an abstract of deed to Eli Albright.
Q. Anything to show who that was from, or the date?
A. I have not the record.
Q. Can you tell whether the lines of the deed, by which you ran, extended beyond the exterior boundaries of the Diadem or not?
A. I ran the fourth line north 15 degrees and one half east 7 links to the sixth line of the Diadem, and to the best of my knowledge that last line ran beyond the Diadem; I ran no further on that line.
Q. Then your understanding is that that tract extended north of the sixth line of the Diadem?
A. The calls will take it north.
Q If run: now is it not also true that the calls would take it south of the southern line of the Diadem?
A. The 14th line would run south 40 degrees west 99 6-10 perches to a stake at the end of 91 9-10 perches on the 9th line of the Diadem; that line I believe also extended south of the eighth line. I made no survey further south.
Q. I notice a small corner in the northwest corner of the Diadem as laid down on the map with the letters D. E. just outside of the line; what does that small corner indicate or represent?
A. That represents the portion of the Diadem held and under fence by J. A. Kelley.
Q. Is that all the land that Kelly has, that little corner?
A. That is all he has within the Diadem.
Q. Has he any other generally?
A. Yes, he owned that land outside.
Q. The large body?
A. That I do not know.
Q. You did not run the land outside?
A. No.
Q. That means, does it, that Kelley's tract of land extends into the Diadem there at that point as reperesented?

A. It represents the land, which he has under fence. Its connection with other tracts I have no knowledge.

Q. Did you survey that little piece?

A. I surveyed it according to the lines of the Diadem, and according to its position as indicated by the fence and certain marked trees.

Q. You didn't run by any paper?

A. Well, no; I didn't. I ran according to the marked corners shown me by Mr. Kelley, as within the lines of the Diadem.

Q. Did Mr. Kelley say they were within the lines of the Diadem?

A. I don't know that he did.

Q. You first ran the exterior lines of the Diadem and then ran this line that Kelley pointed out as his line that were within the Diadem?

A. Yes, sir.

Q. Did you have his deed to run it by?

A. My recollection is that we didn't, the land is all cleared and it is a very small piece; you can see from one corner to the other without any trouble, and I think we merely went to the Diadem line and measured.

Q. There is no fence corresponding with the 7th line of the Diadem is there?

A. Not at that point.

Q. The fence conforms to the little corner that you have cut off?

A. Practically, yes.

Q. It then extends westward?

A. The cleared land does, yes.

Q. Now, take D. L. What does that represent?

A. That represents a portion of the Diadem, owned by Hiram Renninger, and it was located by beginning at the end of 118 2-10 perches on the 7th line of Diadem, and running with the 7th line south 34 degrees west 135 2-10 perches to the end of the 7th line, and then with the 8th line of Diadem east 14 perches, then to the beginning.

Q. Does Hiram Ringer own the land west of that strip?

A. I do not know whether he does or not.

Q. Well, how do you know he owns that little strip there?

A. That portion, my recollection is was located same as the portion marked D. I. was. The adjoining section to the east marked D. M. belonging to W. C. Albright, that calls to begin at the end, not

to the beginning, but ran to the end of 04 perches on the 8th line of the Diadem.

Q. That is the call in the deed?

A. That is the call in the deed, yes, with W. C. Albright, and this is the line to the west of W. C. Albright.

Q. Now, Mr. Brown, are you sure that there is a call in the W. C. Albright's deed for the 8th line of Diadem?

A. I cannot say whether there is a call in the deed. That is the way the survey was made, that is the way I ran the survey.

Q. Going back to D. L. is it not a fact that Renninger owns the land west of that strip you have laid off there marked D. L.?

A. That I do not know; I do not know whether he does or not.

Q. You don't know whether he owns that piece or not; didn't you locate that little strip by the line fence between Ringer and Albright?

A. Well, the fact of the case was that the 7th line of Diadem was run and 14 perches on the 8th line, and the remaining line of that strip was laid down by protraction, that is, the actual fence.

Q. Oh; is there not a line of the fence there between Ringer and Albright?

A. There is a public or private road, I do not remember the line fence, there probably is a fence along the County road, but I could *could* not say exactly, as to the relation between the line and the road.

Q. Is it not a fact that Mr. Renninger owns a tract of land lying west of Albright much larger than the little strip there, and that you simply located the Diadem so as to take that little strip off of his land?

A. I really know nothing about Mr. Renninger other than I was told that the strip lying west of Mr. Albright was owned by Mr. Ringer. That is all I know in regard to it.

Q. Well, now, take the tract D. N. What Albright is that?

A. W. C. Albright.

Q. Is there any part of his tract lying outside of the exterior boundaries of the Diadem, south of it?

A. I cannot say in regard to that. I surveyed according to the lines lying within the Diadem, beginning at the end of the 118 2-10 perches on the 7th line of the Diadem, and running south

30 degrees west 126 perches to a stake at the end of 14 perches on the 8th line of the Diadem; second, I ran east 77 perches and 9 links to the land of Eli Albright: third, north 40 degrees east 99 6-10 perches; fourth, north six degrees and one-half west 19 3-10 perches to a hickory near a spring, that is the beginning.

Q. Your report of your survey states that you ran one of your lines to the 8th line of the Diadem. Can you tell from that whether that was the full distance of that line, or whether you stopped because you had gotten to the Diadem line?

A. I cannot tell whether it is the full distance or not.

Q. If the line had been longer, you would have stopped when you got to it according to the method you were running?

A. Yes, sir.

Q. That is what you were doing?

A. Locating what was in the lines of the Diadem, yes.

Q. Now, tract D. O. in which the word 'Spring' occurs, what does that represent?

A. That portion marked D. O. within the lines was merely laid out in town lots, the town of Cranesville, lying principaly within that portion of the Diadem?

Q. Does the town of Cranesville lie wholly within D. O.?

A. The town principally I think does.

Q. Would Browning's store be in there?

A. It would.

Q. And the Van Meter Hotel?

A. It would.

Q. Do you know by whom those lots were laid out?

A. No, I don't.

Q. Or when?

A. No, I do not know when, some years ago, though, I understand.

Q. Well, was there any lots laid out south of the Diadem?

A. Not to my knowledge.

Q. Did you have before you the plot of the town as originally laid off?

A. No.

Q. Do you know whether the plot conforms to the line D. O. to the lines of D. O.?

A. Well, one of the lines of that tract D. P. calls for the lines of these lots.

Q. I will ask you this, Mr. Brown, if you can state that any of the subdivisions lying west of the line ran by Julius K. Monroe in 1894 and any of the subdivisions of the Diadem conform in their exterior lines or any of them, with the exterior lines of the Diadem?

A. Well, I have not the papers to show, but according to the testimony we have just given, nearly all the tracts extended somewhat beyond the lines of the Diadem.

Q. They all do, unless it is the tract D. D., do they not, or else lie within it like the tract D. G. wholly, would that be your judgment?

A. As I say, I have not the papers, but that is my idea.

Lands Within the Diadem not held Under that Maryland Patent.

As has been stated, the burden of proof in this case is upon the State of Maryland. (Beyond the mere location of the original patent of the Diadem, she has offered practically no proof to show that the lands within the lines of that patent have ever been heard of or claimed under this Maryland grant.) The lines of the Diadem are called for in certain deeds under which the land is claimed, but this is evidently merely for convenience of description, and not because the Diadem is referred to as the source of title.

John Crane Held These Lands Under the Virginia Titles.

On behalf of the State of West Virginia, we have offered abundant proof to show that these lands within the Diadem all belonged to John Crane; that he lived on them at the point where Mike Feathers' house now stands. This point is designated by the words "Mike Feathers" on Monroe's map No. 1, and that the present holders of these lands claim them under deeds from Crane, or his executors or heirs, made after his death. We will proceed to give this evidence at the risk of being tedious. Under certain early statutes of the State of Virginia, lands in the Western part of the State, which had not been entered on the land assessment books for taxation, became forfeited to the State and were designated as delinquent and forfeited lands, and commissioners were appointed in the several counties, who were empowered, under

certain regulations, to sell these delinquent and forfeited lands and make deeds to the purchasers, conveying all the State's right and title in them, subject to certain reservations in favor of actual prior occupants and claimants. It will appear that these Stephen West patents, which are located upon the Diadem, as we have seen, became delinquent and forfeited to the State and they were sold by William Seigler, Commissioner of delinquent and forfeited lands for Preston County, on March 9th, 1840, to John Crane, and a deed was afterwards made to John Crane by the said William Seigler, Commissioner, which is dated June 8th, 1840, and a certified copy of which is filed in this case as "Monroe Exhibit No. 20" found on page 1800 of the printed Record. This conveys unto the said John Crane:

> "All those several tracts or parcels of land situate in the Pine Swamp along and near the Maryland line in Preston County, aforesaid, being the same land surveyed for William McClery, by him assigned to Stephen West, containing 2700 acres of land, and sold as aforesaid, as the land of Stephen West's heirs."

We have filed in this cause four patents to Stephen West for lands in this Pine Swamp country, all of which were based upon surveys made for William McClery and assigned to Stephen West. These patents are for 500 acres, (page 1797), 400 acres, (page 1798), 400 acres, (page 1799), and 1000 acres, (page 1801). These amount to only 2300 acres, whereas the deed calls for 2700 acres. There is evidently another 400 acres patent, which we overlooked. In addition to this, John Crane obtained a title to the 520 acre survey of Abram Jeffers, William Elliott and Henry Simes, by deed dated August 13th, 1832, recorded in Preston County Clerk's office in Deed Book No. 3, page 167, found on page 1802 of the printed Record. John Crane also obtained a title to the John Summers patent for 200 acres lying East of these Diadem lines, by deed dated August 31st, 1839, recorded in Preston County Clerk's office, Book 7, page 133, filed in this cause as "Monroe Exhibit No. 23," page 1804 of the printed Record. A considerable portion of these lands passed into the hands of Joseph C. Feather, as the testimony shows in this cause. We call attention to the deed from the widow and heirs of John Crane, deceased, to William Hauger, dated July 31st, 1861, recorded in Preston County Clerk's office

in Deed Book 16, page 366, and found in the Record on page 1531. It recites that John Crane, on the 14th day of May, 1850, sold, by title bond, to Edmund Kelley, since deceased, a certain tract containing 280 acres, the title bond having been assigned to William Hauger, who paid the residue of the purchase money to the administrator of said Crane; grants "all the following described tract or parcel of land lying in the County of Preston, in the State of Virginia, near the village of Cranesville, adjoining the lands belonging to said heirs, being the same upon which Julia Ann Kelley, widow of said Edmund Kelley, deceased, now resides, containing, by estimation, 280 acres," and then gives metes and bounds. William Hauger's heirs conveyed this land to Philip Dennis, and Philip Dennis and wife, by deed dated April 1st, 1868, conveyed the same to Joseph C. Feathers. This deed was recorded in Preston County Clerk's office in Book 24, page 155, and found on page 1534 of the printed Record. 676½ acres of this land covering Diadem, was conveyed to the said Joseph Feathers by the widow and heirs of John Crane, deceased, by deed dated May 4th, 1864, recorded in Preston County Clerk's office in Deed Book No. 19, pages 5, 6, etc., and is found on pages 1792 to 1797, inclusive, of the printed Record. The land conveyed by this deed is described as follows:

> "All the following described tract or parcel of land, situate partly in the County of Preston, and State of West Virginia, and partly in adjoining County of Allegheny, in the State of Maryland, and known as the "Home Farm" of the said decedent, and some adjoining parcels; estimated to contain six hundred & seventy-six & ½ acres, more or less, this being a sale in gross, (and not by the acre) and bounded as follows, to-wit:
>
> Beginning at a stake in the first line of the tract of land called "The Diadem" fifty-four poles from the beginning, corner of said tract, and also in the 11th line of the tract called "Recourse" patented to Samuel Selby 3rd and James and Thomas Cook on the 12th May, 1796, by the State of Maryland, and known also as the "White" tract of land, and running thence with the said first line W. 60 E. 120 poles to a stone heap 2 red oaks, and a Chestnut Pointers, corner to Alpheus McNear; thence with said McNear's and John E. Otto's line N. 70 W. 165 poles to a small red Oak, said Otto's beginning corner; thence

West (running up over the Nettle Ridge) 213 poles to David Wolf's line; thence with Wolf's line S. 5 W. 12 poles to a Red Oak and Chestnut Pointer, corner to Wolf and Jonathan Wilhelm; thence with four of Wilhelm's lines reversed, to-wit: S 28 W. 32 poles to a Red Oak; thence S. 81 W. 60 poles to a stone and pointers; thence S. 17 W. 134 poles to a stake; thence N. 72 W. 47 poles to a Box Elder (or Mountain Ash) in Samuel Crane's line; thence with two of his lines, to-wit: S. 5 E. 16 poles to Pine and Cherry; thence S. 32 degrees 12′ W. 105 poles to a stone, marked J. W. E. (formerly known as the Edwards corner) standing on the South side of the road leading from Cranesville to Henry Albrights, and in his line, thence with two of his lines reversed, (and the said road) S. 85 E. 48 poles No. 74 E. 45 poles to the rear line of lots (known on the plat of the village of Cranesville as lots Nos. 51 and 49 &c.; thence S. 36 E. (supposed to be the outline of the West end of the town lots.) 20 poles to a small Chestnut (recently cut down) and Chestnut pointers, corner to Philip Dennis; thence with his line reversed S. 30½ W. 103 poles to pointers in a line of the Harrison Sypolt survey; thence with a line of the same N. 53 W. 39 poles to a stone pile in said Albright line; thence with six of his lines, to-wit: N. 1 E. 24 poles to a stake at the fence on the north side of the Kingwood road; thence N. 53 E. 16 poles N. 70 E. 30 poles; N. 59 E. 32 poles, N. 37½ E. 22 poles; N. 36 W. 6 poles to the East end of said Feather's line (running N. 74 E. 45 poles); thence with the said rear line of lots 51 & 49 &c. N. 56 E. 138 poles to the N. W. corner of the Graveyard lot; thence S. 75 E. 14 poles; thence with the land N. 78 E. 36 poles and 9 links to a corner of the Tanyard lot (sold to Chas. F. Stone; thence with a line of the Tanyard lot (the present fence) S. 56 E. 96 poles to a stake in the Edmond Kelly line (now said Dennis's); thence E. 203 poles to a stake in the 9th line of the tract of land purchased by the Grantors from William Brooming; thence with the residue of the said 9th line reversed North 67 poles to a stake; thence in the 8th line of the Brooming tract reversed East 30 poles to a stake at the end of the 12th line of said tract called "Recourse"; thence with the said 12th line reversed (being the 7th line of the Brooming tract) N. 37 W. 40 poles to a stake; thence with a part of the 11th line of the said tract called "Recourse" (being the 6th line of the said

> Brooming tract) North 61 poles to the beginning. The aforesaid boundaries embrace about 22 acres of the Cunningham, or Charles Martin Survey, 129¼ acres of the tract called "Sigonia", purchased by the Grantees of Wm. Browning, and a portion of the John Summers Survey of 200 acres, in addition to the part known as the decedents "Homestead" as aforesaid."

We call attention to the fact that this land is said to be known as the home farm of said decedent, and some adjoining parcels. It was the home farm of John Crane. Now *the old home where John Crane lived and died is proven by a number of witnesses to have been at the exact point where Mike Feathers lives, designated on the Monroe Maps by the name "M. Feathers" and a square dot. This point is in the Southeastern portion of the Diadem tract. It is nearly midway between the Michler line and the old Maryland line as described by the witnesses in this case, and is Northeast, a short distance, from the village of Craneville.* That village is not laid down, but it is at the point marked "Spring" on Monroe's Map No. 1, some distance West of the Michler line. We give the testimony upon this point. In connection with this testimony and as a feature of this cause, it is not improper to call the Court's attention to the fact that no surveying was done or any testimony taken by the State of Maryland in this cause until after the State of West Virginia had completed the survey of Monroe's reference lines in 1894 and had taken the testimony of a large number of witnesses in 1896. The testimony of these witnesses, taken in 1896, is found somewhat out of their chronological order as compared with the evidence taken by plaintiff on pages 1410 to 1556, inclusive. In 1896 Ethbell Falkenstein was examined as a witness (page 1464). He owns a portion of this land within the exterior lines of the Diadem. He is the only man there West of the old Maryland line who votes in Maryland, and that has only been recently, for some reason of his own, as shown by the testimony of other witnesses. His testimony, taken in 1896, page 1464, is as follows:

> "Ethbell Falkenstein, a witness produced on behalf of the State of West Virginia, being duly sworn, deposes as follows:
>
> Examination by Mr. Price:
>
> 1st Question. How old are you?

Answer. I am a little past 61.

3rd Question . Your occupation is farming, I suppose?

Answer. Yes, sir.

3rd Question. Do you own any land lying between the old Maryland line, and the new Maryland line?

Answer. Yes, sir—well, that depends on where the new Maryland line is of course.

4th Question. I mean the Michler line?

Answer. Yes, what we own. I don't know just what there is of it.

5th Question. From whom did you purchase your land?

Answer. From Smith Crane.

6th Question. Was he representing the heirs of John Crane?

Answer. Yes, sir.

7th Question. Do you live upon that land?

Answer. Yes, sir.

8th Question. How long have you lived on it?

Answer. I cannot tell the exact date now.

9th Question. Well, just approximately?

Answer. I moved here five years after I was married, and I was married in 1861.

10th Question. Have you lived here ever since?

Answer. Yes, sir.

11th Question. Did you build the house in which you live?

Answer. Yes, sir.

12th Question. Do you know where the new Michler line passes through your land?

Answer. Yes, sir.

13th Question. Is it east or west of your residence?

Answer. It is west.

14th Question. About how far west?

Answer. I suppose about 100 rods.

15th Question. Do you know where Julius Monroe, the surveyor in this case, ran the line through your property in the fall of 1894?

Answer. Yes, sir.

16th Question. Did he run east or west of your residence?

Answer. He ran east.

17th Question. About how far east?

Answer. I suppose it is about 12 or 14 rods. Something about 14 rods, I reckon.

18th Question. Did the Monroe line run east or

west of what was known as the old Maryland line through the property?

Answer. It runs west of the old Maryland line.

19th Question. About how far west?

Answer. Well, I guess it is about the same distance, about 100 rods, as near as I could guess at it, you know. Of course, it is guess work with me.

20th Question. Who owns the land adjoining you on the East?

Answer. John E Otto.

21st Question. From whom did he get his title?

Answer. Got it from Crane's heirs. He bought of the old man himself. That is the way that is.

22nd Question. Is there a public road running through your farm?

Answer. Yes, sir.

23rd Question. Which direction does it run through the place, east and west, or north and south?

Answer. It runs north and south.

24th Question. Does it run east or west of your residence?

Answer. It runs east.

25th Question. Is that road worked by the Maryland or West Virginia authorities?

Answer. I might say by both, because we have always worked it ever since I have lived here.

26th Question. Was that road worked by the road supervisors, or supervisors of Maryland?

Answer. No, it has never been worked by the supervisors.

27th Question. Was it worked by the road supervisors, or under their direction, of West Virginia?

Answer. Yes, sir.

28th Question. Whose land adjoins you on the north?

Answer. The old Banks survey. That belongs I reckon to Browning yet.

29th Question. And who owns the land adjoining you on the south?

Answer. J. W. and M. E. Feather. Well, now, right here it might be necessary to correct. One of my boys, Charlie Falkenstein has settled here, and bought from J. W. Feather 2½ acres, and from M. E. Feather 10 acres, but he has not got a deed for it yet. And also, there is another one of the boys George settled over here. He runs clear through. That has not been attended to.

30th Question. Does your Eastern boundary extend over to what is known as the old Maryland line?

Answer. It crosses the Maryland line, 14 rods this side of the corner.

31st Question. Does your eastern boundary correspond all the way with the old Maryland line?

Answer. No, sir.

32nd Question. Crosses it at the northern or southern end?

Answer. Northern corner, near the Banks survey.

33rd Question. Then on the southern side, does it extend over to the old Maryland line?

Answer. No, sir.

34th Question. Did you have your deed for this land recorded in Preston County, West Virginia?

Answer. Yes, sir, before the burning of the court-house.

35th Question. Did you also have it recorded in Maryland?

Answer. Had it recorded in Cumberland, Allegany county.

And further this deponent saith not."

It will be noted that he testified that John E. Otto owns the land adjoining him on the east. This man Otto was a son-in-law of old John Crane, and unites in the deed above mentioned to Joseph C. Feathers from John Crane's heirs, his wife being designated as "late Jane Crane." Falkenstein testifies here that he bought a piece of land from Smith Crane, representing the heirs of John Crane, in 1866, and that his eastern boundary extends all the way with the old Maryland line; that he had his deed first recorded in Preston county, West Virginia, before the court house was burned, and says he recorded it afterwards in Cumberland; that was when he attempted to change his allegiance. This same man, Ethbell Falkenstein, was called as a witness on behalf of the state of Maryland in 1902, and his testimony is found on pages 1117 to 1127 of the printed Record. He testifies here to having pointed out to Mr. Brown, surveyor, on the ground a red oak as the center of the Deakins line and says that John E. Otto, who was then dead, pointed out to him. He says that this red oak stood within five or six feet of the division line between him and John E. Otto; was not any line of the Diadem tract, but was some twenty-three rods from the outside line of the Diadem, but Otto told him it was on the Deakins line. He then testifies as follows (pages 1120 to 1122 of the Record):

"Q. You are the same man who was summoned as a witness in this case some yeas ago, aren't you?

A. By whom?

A. By the State of West Virginia?

A. Oh, yes, sir.

Q. Mr. Falkenstein, you said you lived on the old Gable place?

Answer. Yes, sir.

Q. Why was it called the Gable place?

A. Because Gable settled it in the first place.

Q. What Gable is that?

A. His name is William Gable.

Q. Did he take the land up?

A. No, indeed, bought it of Crane.

Q. John Crane?

A. Yes. sir.

Q. It was a part of the Crane land then?

A. Yes, sir, part of the Crane place.

For Plaintiff:

Q. Did he buy it from Mr. Crane as a part of the Diadem?

A. I guess.

For Defendant:

Q. Did Mr. Crane have a Maryland title or a Virginia title?

A. I could not tell you that, that was before my recollection, that happened 70 years ago, I expect, that is Mr. Crane bought this Diadem tract.

Q. Mr. Crane held under a Virginia title?

A. I could not tell you that.

Q. Eh?

A. I could not tell you that.

Q. Didn't you know the land was assessed in Virginia for taxes?

A. I have heard that, I never knowed what the suit was, I knew they had a suit about it.

Q. Mr. Crane lived in Virginia, or claimed to?

A. Yes sir, I believe so.

Q. He lived between the two lines, didn't he?

A. Well, the building was between the two lines, the Deakins line and the Michler line.

That is all.

Q. Do you know of your own personal knowledge whether Mr. Crane paid taxes in Virginia or not?

A. Oh, no; no I do not know that, it was before my

time. Mr. Crane has been dead quite a number of years.

Mr. Price:

Q. Did you know him?

A. Oh, yes sir; I knew him well and his whole family, but in regard to that I didn't know; he was a man who had a great deal of business at the Preston Capital.

Q. Do you know where he voted?

A. I don't.

Q. Did you ever see him vote?

A Sir?

Q. Were you never at the polls when he voted?

A. No.

For Plaintiff:

Q. They did not own any other property than that Diadem?

A. Why, the Bank Survey.

For Defendant:

Q. Mr. Falkenstein, do you know the eastern boundary of that eight thousand acres of survey?

A. Yes sir.

Q. Now, this red oak that you speak of, wasn't it in the line with that eastern boundary of the Bank Survey?

A. You see, it is about 23 yards south, of the Banks corner. It is not in an exact line.

Q. How far off; it is not pretty near in a straight line?

A. Right across the Deakins Line on the line—I think you go to the corner in the Diadem line there; the Banks Survey comes in in place of the Diadem.

Q. What I am asking is this, take the eastern boundary of the Bank Survey, and extend it southward, won't it strike, or very nearly strike this red tree?

A. It will come close to it, about five or six feet, as I told you awhile ago."

Plaintiff also produced a witness, John P. Lewis, who, after giving some rather queer testimony about a man by the name of Gabriel Friend being present on the survey of the Maryland-Virginia line, and that the line was run through a spring in Cranesville; which testimony is manifestly incorrect, as is shown later on.

On cross-examination he testifies, (Record, pages 1124 to 1127) as follows:

"Q. You say it was about a tax matter?

A. Yes sir. They had a dispute up about the line.

Q. Who had the dispute?

A. Well, it was old Johnny Crane and some other man who disputed about the line.

Q. What other man?

A. Well, I do not remember just who it was; I know it was old Johnny Crane sent for old Gaby; He had helped carry the chain, the report was, and he come up and swore it run right through that spring.

Q. Who did he swear before, who took the oath?

A. I think old Johnny Crane was Squire. I think he swore him.

Q. Was Johnny Crane one of the parties to the dispute?

A. Yes, sir, he was one of the parties that had the dispute about the line.

Q. And he was the man that administered the oath?

A. Yes, sir.

Q. Now, who was the other party to the dispute?

A. I do not remember who it was disputing with old Johnny.

Q. How were they disputing?

A. Well, they was disputing about the taxes; they claimed it in Maryland and claimed it in Virginia.

Q. But who was disputing about it?

A. Old Johnny Crane and some man was disputing about it: they were disputing about paying the tax.

Q. Just having a talk about it?

A. Yes sir, and the two States.

Q. The two States.

A. Yes, sir: each one wanted the tax.

Q. Which one got the tax?

A. I do not know.

Q. Don't you know that the State of West Virginia collected taxes east of that spring after that?

A. Well, I do not remember whether they did or not.

Q. Don't you know that the old State line was recognized east of that spring after that dispute?

Objection by Plaintiff.

Q. I think I heard that, but I do not know anything about it. I did hear, I think, once, that it run to the other Crane place; they said there was a chestnut tree marked, but I do not know anything about it.

Q. Who told you that?

A. It was reported all through the country.

Q. It was recognized in the neighborhood here as the chestnut tree on the other side of the Crane place?

A. Yes, sir, they was just talking about it; I did not know anything about it.

Q. You don't know anything about this spring?

A. Only what he swore; I cannot swear to it.

Q. Did any one else swear about the line?

A. No sir.

Q. Did they have any other witness?

A. No.

Q. Did they have any trial?

A. No trial.

Q. What were they swearing this man for?

A. Well, they hadn't had no trial, but they disputed, Virginia wanted the tax; of course over here, and Maryland wanted them, and they sent for him to settle the dispute and they had him sworn, but I do not know how they settled it.

Q. Who else was present?

A. Oh, there was not any one that I know of.

Q. Nobody but Crane, Gabriel Friend and you?

A. There was Crane and Gabriel Friend and me and some of Crane's hands, I do not recollect.

Q. Were you working for Mr. Crane then?

A. Yes, sir.

Q. How old were you?

A. How old was I?

A. Yes?

A. Oh, I cannot tell; I am going on 85 now and I was not more than growed up; I was young, but it has been a good many years ago, but I cannot just tell what year it was in.

Q. Was Crane living in this part of the country then?

A. Yes sir, on the Crane place here.

Q. Whose house is there, where he lived, now?

A. Oh, I do not know, he built a new house there; I do not know whether that is there; I have not been there for several years.

Q. Well, was that house of his east or west of this spring that you talk about?

A. Oh, it was east of this spring.

Q. East of the spring?

A. Away over east of the spring.

Q. Well, Johnny Crane always claimed to live in Virginia?

A. Yes sir, he always claimed to live in Virginia.

Q. Did you ever live with him?
A. Oh, I never lived with him, but I worked for him.
Q. You worked for him?
A. Worked for a year with him, hired.
Q. When you were working for him there where did you vote?
A. I was not old enough to at all.
Q. You didn't?
A. No.
Q. Where did Johnny Crane vote?
A. I think he voted in Virginia, I think so.
Q. And paid his taxes in Virginia?
A. I think so, most of his land.
Q. The land where he lived?
A. Well, where he lived, I think he paid his taxes mostly in Virginia, I think.
Q. Did he have much land there?
A. Oh, he had a great deal that he claimed; I do not know whether it was all his'n or not, but he claimed a good deal.
Q. Where did Gabriel Friend live?
Q. Down about what they call Friendville.
Q. Then, at that time?
A. Then, yes, sir, at that time, always lived down there until he died, I reckon, I think so.
Q. Had you ever known him before?
A. Oh, I knowed him when I seen him, but was not well acquainted with him.
Q. You said that he carried the chain to this spring and camped there that night?
A. Yes sir, he said they stretched the chain across this spring, and camped there until the morning, and then run on.
Q. Did he say when that was?
A. Well, it was when they were running the line; I do not recollect as he said what year it was.
Q. What were they running the line for?
A. It was run betwixt the two states.
Q. What for?
A. I reckon to divide the two states, I do not know what else it was run for, I suppose that is what they run it for.
Q. Where did you live then?
A. I lived down across the river, my father did. I had no place then, only lived with my father; I worked for old Johnny Crane.
Q. Have you ever owned any land along the line?
A. Owned any?

Q. Yes.

A. No, I never owned any land close the line, never owned any close the line.

For Plaintiff:

Q. Mr. Lewis, how long has Gabriel Friend been dead?

A. Well, I can not tell you how long, but I reckon it has been a good many years; it must be 28 or 30 years since he was dead. I can't tell you just how many years it was.

Q. Well, how old a man was he at the time he came up here and swore to the line crossing the spring?

A. I can't tell you how old he was, he came walking with his cane. It has been built up since I used to drink out of it.

Q. It is right here in town, the spring?

A. Yes sir, it is called the Notley Brown spring, I think.

Q. Right back of where Mr. Notley Brown used to live?

A. Ugh hugh.

Mr. Price:

Q. Don't you know that that spring never has been recognized by anybody as the State line, did you ever know anybody to recognize that spring as being on the State line?

A. I do not know that I did; I do not remember that I did.

We next call attention to the testimony of Michael E. Feather, (Record, page 1457 to 1460, inclusive) taken in 1896, which is as follows:

"Michael E. Feather, a witness produced on behalf of the State of West Virginia, being duly sworn, deposes as follows:

Examination by Mr. Price:

1st Question. What is your age?
Answer. 49 years old.
2nd Question. And your occupation?
Answer. Farmer.
3rd Question. Where do you reside?
Answer. In Virginia.
4th Question. West Virginia?
Answer. Yes, sir; West Virginia.

5th Question. Near Cranesville, Preston county?

Answer. Yes, sir.

6th Question. Do you own land adjoining the boundary line, between the state of Maryland and West Virginia?

Answer. Yes, sir.

7th Question. What quantity of land do you own?

Answer. Well, that is, your mean up to the line?

8th Question. Well, yes, if you can give it.

Answer. Well, 190 acres, where I claim to own.

9th Question. Do you reside on the land you have spoken of?

Answer. Yes, sir.

10th Question. How long have you lived there?

Answer. Well, I have lived here, it is 30 some years. I just forget the number of years. I could tell though exactly, if I was in the house a little bit. If it is not so particular, it was thirty some years.

11th Question. Do you know about where the new Michler line runs through your land?

Answer. Well, I used to see a stake that stood out there on the other side of that barn. I guess that is the name of that line, and then also there was a stake down the road here a piece that I used to see, that I have been told was the line. I did not see the men run the line, but that is what I have been told.

12th Question. Is that line east or west of your residence?

Answer. It is west.

13th Question. Is it west of your barn?

Answer. Yes, sir.

14th Question. Do you know where Julius K. Monroe, the surveyor in this case, ran a line through your property, in the fall of 1894?

Answer. Yes, sir; I do.

15th Question. Is that line east or west of your residence?

Answer. It is east of my residence here.

16th Question. Your residence, then, is between the Monroe line, and the Michler line?

Answer. Yes, sir.

17th Question. Now, where do you claim, and have always recognized the Maryland boundary line to be?

Answer. Well, I could show you where everybody claims it, if it was in sight. It is right down here near that pine grove.

18th Question. Is that east or west of Mr. Monroe's line?

Answer. It would be east of Mr. Monroe's line.

19th Question. About how far east?

Answer. I don't hardly know the exact distance. It wasn't surveyed, or I never measured the exact distance. I couldn't tell you.

20th Question. It is some considerable distance, is it?

Answer. Yes, considerable distance.

21st Question. Is your land cleared up to that old line, any part of it?

Answer. Yes, part of it is. It is not all cleared up to that line.

22nd Question. When was the house in which you live built

Answer. Well, now, I forget.

23rd Question. About how many years ago?

Answer. Only three or four years ago. About probably five years ago, I built the house.

24th Question. Was there any house on that land before you built your present residence?

Answer. Yes, sir; there was an old house, a very old one, too.

25th Question. Where did it stand?

Answer. Stood right where that one does. Had to take it away to put that house there.

26th Question. From whom did you get your title to the land on which you now live?

Answer. I got it from my father, Joseph Feather.

27th Question. Is he still living, and if not, when did he die?

Answer. He died last July.

28th Question. From whom did he get the land.

Answer. He got it of Smith Crane, and the heirs, Crane heirs.

29th Question. Heirs of whom?

Answer. Of John Crane, deceased.

30th Question. The old house that stood on the land before you built your new one—who occupied it before you came there?

Answer. Well, my brother-in-law was living in the house, before I moved there, Falkenstein.

31st Question. Who lived in it before Falkenstein?

Answer. A man by the name of Lininger.

32nd Question. Did Lininger occupy it as a tenant?

Answer. Yes, sir.

33rd Question. Whose tenant?

Answer. Why Smith Crane's, the the Crane heirs.

34th Question. And who occupied the house before Lininger?

Answer. Why, so far as I know, Crane himself.

35th Question. That is, what Crane?

Answer. That is John Crane, deceased, and family occupied it before this man Lininger moved in, as far as I can tell. That is what I have been told.

36th Question. Had the Cranes lived on this land for a long time?

Answer. Yes, as long as I can remember anything about it. I have been told that they moved there, and there wasn't a stick of timber amiss, and old Mr. Crane cleared all this out here, and he died.

37th Question. How much cleared land have you here, between the new and the old lines?

Answer. Well, I couldn't tell you exactly. It is over 100 acres though of it.

38th Question. Is it good land?

Answer. Yes, it is right good. Some of it is not—land, up to the old Maryland line, of which you have spoken, assessed for taxation?

39th Question. In what state and County is this?

Answer. In West Virginia.

40th Question. What county?

Answer. Preston County, West Virginia.

41st Question. Have you and your father been paying taxes on this land, ever since you owned it, in Preston county, West Virginia?

Answer. Yes, sir.

42nd Question. Is there a public road runs through your land?

Answer. Yes, sir.

43rd Question. What direction does it run?

Answer. Well, east and west.

44th Question. Does it run over into the State of Maryland?

Answer. Yes, sir.

45th Question. How far do the West Virginia authorities work that public road?

Answer. They work it down here to the supposed old Maryland line.

46th Question. That is the line you have spoken of as the eastern boundary of the State?

Answer. Yes, sir.

47th Question. Where do you vote?

Answer. I vote in West Virginia. Cranesville is our voting place here.

48th Question. Can you tell about how far your line extends along the old state line?

Answer. Why, I couldn't tell just exactly the distance.

49th Question. Well, is it half a mile, or three-fourths, or a mile, or what would you say?

Answer. Well, I would suppose it is very nearly half a mile across. I will say a half a mile.

50th Question. Do you know where there are any military lots opposite or nearly opposite your land, in Maryland?

Answer. Yes, sir.

51st Question. How does the western boundary of those military lots, correspond with the old Maryland line, as you claim it?

Answer. Well, as near as I know it comes close to it, as far as I have been told. I don't know, only what men have told me, you know, when it comes up something near to them.

52nd Question. Has the new Michler line ever been recognized in any way here as the State boundary line?

Answer. No, sir, not any that I know of.

53rd Question. Does your line connect with any of the military lots, on the Maryland line?

Answer. Yes, sir, it connects, if I am not mistaken, the number—it is not particular about the number is it?

54th Question . If yon know it?

Answer. 1402.

55th Question. Who owns that military lot No. 1402 now?

Answer. Israel Frankhauser. Well, he sold it to his son, Marshall Frankhauser.

56th Question. Does Frankhauser, as the owner of that lot, claim to run west of the old Maryland line, as you claim it?

Answer. No, he claims east of that line.

57th Question. Have the Maryland authorities exercised any jurisdiction in any way over any part of the land you claim west of the old Maryland line?

Answer. Well, no, they haven't.

58th Question. Who owns the land north of you, adjoining the Maryland line?

Answer. Ethbell Falkenstein.

59th Question. And who owns the land south of you adjoining the line?

Answer. Well, part Henry Albright, and J. Zalmon Feather, and J. W. Feather, my brother.

60th Question. Do Albright and the Feathers you have spoken of claim those lands south of you, under Virginia or Maryland titles?

Answer. Under Virginia titles.

And further deponent saith not."

It is clear from this testimony that Michael Feather, whose house is at the point mentioned above in this Diadem tract and between the Michler and the old Maryland line, lives at the same place where his father, Joseph Feather lived, and that this is the same place where the old home of John Crane stood. He says that John Crane lived in this house, and that the Cranes had lived in it; as long as he could remember, he had been told that they had lived there. and there wasn't a stick of timber amiss. Old Mr. Crane cleared this out here and died here, and that all this land was recognized as lying in Preston county, West Virginia. He and his father always paid taxes there. J. W. Feather testifies to the same effect, (pages 1460 to 1464 of the Record):

J. W. Feather, a witness produced on behalf of the State of West Virginia, being duly sworn, deposes as follows:

Examination by Mr. Price:

1st Question. What is your age?

Answer. 51.

2nd Question. And your occupation?

Answer. Farmer.

3rd Question. And your place of residence?

Answer. Cranesville, Preston county, West Virginia?

4th Question. What was your father's name?

Answer. Joseph Feather.

5th Question. Are you acquainted with a tract of land formerly owned by your father, Joseph Feather, near the town of Cranesville, Preston county, West Virginia?

Answer. Yes, sir.

6th Question. Do you own any part of that land now?

Answer. Yes, sir.

7th Question. About how much of it?

Answer. Well, I suppose about half of it. It says there 612 acres, and it would be dividing half of it.

8th Question. Does any part of the portion that you own adjoin what is known as the old Maryland line?

Answer. No, sir.

9th Question. Does the new Michler line pass through that 612 acres, belonging to Joseph Feather?

Answer. Yes, sir.

10th Question. You are acquainted with that part of the land that is owned by Michael E. Feather, are you?

Answer. Yes, sir.

11th Question. On which side of the house in which he lives did the new Michler line run, east or west?

Answer. West,

12th Question. Do you know where Julius Monroe, Surveyor in this case, run the line through that property in the fall of 1894?

Answer. Yes, I know where the line went.

13th Question. Is that line east or west of the house in which Michael E. Feather lives?

Answer. That is east.

14th Question. Is the Monroe line east or west of the old Maryland line, as you have known and recognized it?

Answer. It is west of it.

15th Question. About how far west?

Answer. Well, I would hardly know just how far it might be. Well, I would say about 30 rods. It may be a little more than that. You know, just guessing at it, a person can't hit it.

16th Question. Is there a public road runs through that land?

Answer. Yes, sir.

17th Question. Which direction does it run?

Answer. Runs about east and west, very nearly.

18th Question. How far east do the West Virginia authorities work that road?

They work it up to the old line, as we recognize it.

19th Question. How long have you known that old line to be recognized, as the boundary line between the states?

Answer. Why, the first I came to this country was about 1862, or '63 and it was recognized at that time, and from that time on.

20th Question. In what state and county is the land lying west of the old Maryland line assessed for taxation—belonging to that farm?

Answer. Well, it was assessed in Preston county, West Virginia.

21st Question. When did your father, Joseph Feather acquire the title to that piece of land?

Answer. I couldn't tell you just the year. If I had found the deed, I could have done it. It seems to me it was in 1861.

22nd Question. From whom did he get the land?

Answer. Bought it from the Crane heirs.

23rd Question. What Crane?

Answer. John Crane. He made the purchase of Smith Crane.

24th Question. Was there a house on the land at the time your father bought it?

Answer. Yes, sir.

25th Question. Who was living in that house, if anybody?

Answer. Yes, there was a man by the name of Lewis Lininger.

26th Question. Who had lived in it before Lininger?

Answer. I believe you have got me now. Dave Wolf over here did live in it awhile, but I don't know whether he lived in it at that time.

27th Question. Do you know who built that house?

Answer. I was told that John Crane built it.

28th Question. Do you know anything about when it was built?

Answer. No, not to any certainty, when the house was built.

29th Question. What is your best information about that?

Answer. The best would be the date on the wall of the barn. That is 1839.

30th Question. Was the house built before the barn, or afterward?

Answer. Why, it was built before.

31st Question. Did John Crane occupy the house as a dwelling house?

Answer. Yes, sir.

32nd Question. Who lived in it after Lininger?

Answer. Ethbell Falkenstein.

33rd Question. And who succeeded him?

Answer. Why, my brother and myself.

34th Question. Which brother?

Answer. Brother Michael.

35th Question. When did you and your brother move into the house?

Answer. Well, he moved in the spring of 1867, and I in the fall of 1867.

36th Question. How long did you continue to live in that house.

Answer. I don't know that I can just tell the number of years. 12 years or such a matter.

37th Question. Then where did you move to?

Answer. Why, built a house right back here, west of Cranesville on the farm.

38th Question. Did your brother Michael continue to live in the house after you left it?

Answer. Yes, sir.

39th Question. What became of that old house?

Answer. Why my brother Michael tore it down and built a new one in its place.

40th Question. Where did he build the new one with reference to the situation of the old one?

Answer. Right on the same foundation.

41st Question. Is that the house he is now living in?

Answer. Yes, sir.

42nd Question. Now, where is that house situated with reference to the new Maryland line, and the line run by Mr. Monroe?

Answer. It is just about half way between the two.

43rd Question. All the time that you lived in that old house upon that place, what state did you recognize your allegiance and citizenship in?

Answer. The state of West Virginia.

44th Question. What line has always been recognized as the Maryland boundary line, by the occupants, on that farm?

Answer. The old Maryland line, we call it.

45th Question. East of the Monroe line, you say?

Answer. Yes, sir.

46th Question. Does that tract of land connect with any of the military lots on the Maryland side?

Answer. I believe it does. It does not from where it begins, but in the closing up.

47th Question. Who owns the military lot that you think it connects with?

Answer. Marshal Frankhauser.

48th Question. Do you know the number of that lot?

Answer. I believe it was 1404, but I am not sure. It adjoins two lots there, and I am not positive which it is of the two.

49th Question. Do you know who has the deed made by the heirs of John Crane, to your father, Joseph Feather, for that piece of land?

Answer. Well, now, it is in the possession of either Mike or me, and he thinks I have it, and I think he has it. So it is between us.

50th Question. Have you looked to see if you could find it?

Answer. Yes, sir; I have made some search this evening for it.

51st Question. Do you know whether that deed has been re-recorded in the clerk's office, in Preston county, West Virginia, since the court-house was burned?

Answer. Yes, it has been.

52nd Question. Does the new Michler line pass through any portion of the part of the 612 acres that you now own?

Answer. Yes, sir.

53rd Question. In what state and county is your land assessed for taxation?

Answer. Preston county, West Virginia.

54th Question. How much of your land lies east of the new Michler line?

Answer. Well, I don't suppose it would be over ten acres.

55th Question. That part is assessed in Preston county, West Virginia, along with the rest, is it?

Answer. Yes, sir. Upon further reflection, I believe that the distance from the Monroe line to the old Maryland line is about 60 rods instead of 30. I think that will come nearer it, upon studying it over."

J. Z. Feather also testifies to the same effect, (pages 1466 to 1468 of the Record) as follows:

"J. Z. Feather, a witness produced on behalf of the State of West Virginia, being duly sworn, deposes as follows:

Examination by Mr. Price:

1st Question. What is your age?

Answer. Well, sir, I am 59, in my 60th year.

2nd Question. And your occupation is farmer, I suppose?

Answer. Yes, sir, always has been.

3rd Question. And you reside near Craneville, Preston county, West Virgiina?

Answer. Yes, sir.

4th Question. Do you own a farm, or piece of land near Cranesville, Preston county, West Virginia?

Answer. Yes, sir; that is what they say I do.

5th Question. From whom did you purchase that piece of land?

Answer. From Phillip Dennis.

6th Question. When did you purchase it?

Answer. In 1868, that is—well, I bought it in the fall of 1867 you know, but I guess I didn't get my deed until the next spring.

7th Question. Do you live on that piece of land?

Answer. Yes, sir.

8th Question. How long have you lived there?

Answer. Well, since 1868. Moved there in April, 1868.

9th Question. Who lived there before you went there?

Answer. Dennis.

10th Question. And who lived there before him, if you know?

Answer. Well, I suppose Edmund Kelly.

11th Question. Did Dennis buy the land from Kelly?

Answer. No, sir, I think Hauger, if I understand it right—Dennis bought it from Hauger—I don't know. He come in about it some way or other.

12th Question. Do you know who conveyed this land to William Hauger?

Answer. That I couldn't tell you, only just what the deed says there. Well, it was John Crane's heirs.

13th Question. Have you the deed that was made by John Crane's heirs to William Hauger?

Answer. Yes, sir.

Said deed is herewith produced, and is dated the 31st of July, 1861, and recorded originally in the county clerk's office of Preston county, in deed book No. 16, page 366, and re-recorded in said office in book No. 47, on page 227, a certified copy of which deed is to be filed with this deposition, marked Exhibit No. 7.

14th Question. Have you the deed that was made to you for this land by Philip Dennis?

Answer. Yes, sir.

15th Question. Did he convey the whole of the land to you by that deed?

Answer. No, sir.

16th Question. Only conveys six-ninths?

Answer. Six-ninths.

17th Question. You afterward acquired the other interests from the other heirs, did you?

Answer. Yes, sir.

Said deed is herewith produced, and is dated April 1st, 1868, and was originally recorded in the county clerk's office of Preston county, in deed book No. 24, page 135, and recorded anew in book No. 31, page 173, a certified copy of which deed—to be filed with this deposition, marked Exhibit No. 8.

18th Question. Do you know where the new Michler boundary line, between Maryland and West Virginia passes through your tract of land?

Answer. Well, that I cannot tell.

19th Question. I just want to know if you know about where it is?

Answer. Yes sir.

20th Question. About how far does your land extend beyond the new Michler line, eastward?

Answer. That, I cannot say. I studied about it this morning. I couldn't fix up an idea, you know. It is such a wilderness, I never get down in there. I did make it one time, to get to the beginning corner, and it was as far as I wanted to go.

21st Question. Does your line extend eastward beyond the new Michler line?

Answer. Yes, sir.

22nd Question. Do you know about where the western line of the military lots opposite to you is?

Answer. No, sir; I do not.

23rd Question. Does your line extend a short distance, or a considerable distance eastward of the Michler line?

Answer. Well, it is not a great distance, I don't think.

24th Question. In what state and county, is your land assessed for taxation?

Answer. In West Virginia, Preston county, I pay taxes for the whole amount.

25th Question. The whole 280 acres is assessed in Preston county, West Virginia, is it?

Answer. Yes, sir.

26th Question. Whose land adjoins you on the north?

Answer. Wesley and Michael Feathers on the north.

27th Question. And whose land lies south of you?

Answer. Well, it is what we call the old original tract, I suppose Wolfe & Hartman now. Since I have been here it goes by the name of Fitchmer tract.

28th Question. Have you looked at the preliminary map made by Julius Monroe in this case?

Answer. Yes sir; I have looked at it.

29th Question. State whether your tract of 280 acres appear to be correctly laid down on that map?

Answer. Yes, sir; it does.

30th Question. Have you a map of that tract?

Answer. Yes sir; I have a plat of it.

31st Question. Do you know what line has been recognized and claimed by the people in this neighborhood as the state boundary line between Maryland and West Virginia?

Answer. Well, they all appear like they claim to what we call the old boundary line.

32nd Question. Is that Michler line recognized and claimed generally through here?

Answer. That is the new line? No, of course, in West Virginia. Well, Mike Feathers you know claims in West Virginia and Falkenstein in Maryland.

33rd Question. Have you recognized and accepted the new Michler line, as the state boundary line?

Answer. No, sir.

34th Question. You claim that all your land lies in West Virginia?

Answer. Yes, sir. That is what I claim. I ought to of course. I pay taxes for it here in this state.

35th Question. You have your title recorded in Preston county, West Virginia?

Answer. Yes, sir.

It will be seen from this testimony that he owns the Hauger tract of land, which came through Kelly and Dennis, and produces the deeds which have been set forth above.

We next call attention to the testimony of Mr. Julius K. Monroe, as to his location of the tract Diadem, and of Mike Feather's house and of certain Military lots and the J. C. Feather's tract of land, the tract of Michael and Wesley Feather, designated on the map "Joseph Feather's 451," the spring in the town of Cranesville and also Falkenstein's house, and other important facts in this connection. His testimony is found on pages 1660 to 1664, and is as follows:

"361st Q. As I understand you—point F1 on your map is intended to represent the northeast corner of the Martin and Hoye thirty six hundred acres? Is that correct?

A. Yes, sir.

362nd Q. Have you located the Maryland tract called "Diadem" on your map?

A. Yes, sir.

363rd Q. In what way are the Maryland grants distinguished on your map from the Virginia grants?

A. The lines inclosing the same are composed of a dash and a dot for the Maryland.

364th Q. And how are the Virginia grants?

A. The Virginia grants are dotted and solid lines, solid lines to represent the original grants, and dotted lines to represent the sub-divisions.

365th Q. Does the Martin and Hoye six hundred acres adjoin the Diadem?

A. No, sir.

366th Q. What land lies between the two tracts?

A. The land of Marcellus Albright, J. C. Feather, Frazee and Michael Feather.

367th Q. Did you locate Michael Feather's house?

A. I did.

368th Q. How did you locate it?

A. I ran a reference line beginning at a chestnut northwest corner of Joseph C. Feather's two hundred and eighty acre tract as shown by him, and ran east one hundred and sixty three and eight tenths poles, thence north five west sixty three and seven tenths poles, thence north seventy eight degrees and twenty minutes east, fifty three and six tenths poles, thence north seventy two degrees and ten minutes east, at the end of forty poles on this line passed three poles to the right of Michael Feather's house, at the end of eighty and fifteen hundredths poles in all to a stake in our reference line at the end of seven thousand nine hundred and one and four tenths poles from the Fairfax stone.

Exception to the answer because the reference lines mentioned by the witness are not located upon the plat.

369th Q. How is "Michael Feather's" house indicated on the map?

A. By the words "Michael Feather," and a small square dot.

370th Q. Where is the point on the map at which you began to run those reference lines you have just given?

A. This point is indicated on the map at red letter F, figure 2.

371st Q. Did you locate any military lots along there on the Maryland side?

A. I located lots fourteen hundred and two and fourteen hundred, I believe.

372nd Q. How did you locate them?

A. I began at a planted stone in Michael Feather's field, and ran the following reference line; South twenty six and one half east fifty and sixty five hundredths poles, south eighteen degrees and five minutes east twenty one and seven tenths poles, south eighty and thirty five hundredths poles to a stake pointed out as I recollect by some member of the

Frankhauser family as the southwest corner of lot fourteen hundred and two. Lots fourteen hundred, twelve hundred and ninety nine, twelve hundred and ninety eight, etc., are laid down from this point by protraction.

373rd Q. How is the point at which you begin to run that reference line, being a stone, as I understood you, in Michael Feather's field, indicated on the map?

A. This point is indicated on the map by red letter and figure F3, and is the same point as indicated on the map of W. McCulloh Brown in this case as black letter E.

374th Q. What relation does the point F3 sustain to the tract called the "Diadem" as you understand it?

A. The beginning corner of the Diadem.

375th Q. Is it so marked on the map of Mr. Brown in this case?

A. It is not indicated as the beginning on Mr. Brown's map, but I believe he testified that it was the beginning,

376th Q. How then does the location of the Diadem upon your map as compared with the surrounding tracts of land and the Michler line compare with the location made by Mr. Brown of that tract?

A. It is substantially the same.

377th Q. Has he located lot number fourteen hundred and two on his map?

A. He has not.

378th Q. Referring to the tracing of the map of Frances Deakins, how does your location of the Diadem and lot number fourteen hundred and two correspond with his location of that tract and that lot?

A. They are substantially the same.

379th Q. I hand you a paper, being a certified copy of a deed from Nancy Crane and others, being the widow and heirs of John Crane, deceased, to William Hauger, dated July 31st, 1861, and filed with the deposition of J. Z. Feathers, marked Ex. No. 7, and I will ask you if you have indicated the location of that tract of land in any way upon your map?

A. I have. That tract of land is indicated on the map by dotted lines, enclosing the words "J. C. Feather 280", and is as I understand it, the same tract of land now owned by J. C. Feather.

380th Q. I now hand you a deed from Phillip Den-

nis and wife to Joseph C. Feather, dated April 1st, 1868, which is filed also with the deposition of J. C. Feather, marked Ex. No. 8. Do you remember who it was produced this deed and had it filed as Exhibit No. 8?

A. Joseph C. Feather.

381st Q. If his name is given in the deposition as "J. Z. Feather", which is right, the name in the deed?

A. I understand that his name, his proper name is Joseph C. Feather.

382nd Q. Is the same man that produced this deed as a witness the one that was living on that tract of land at the time you made the survey?

A. He is.

383rd Q. Did you take any other references from your line in that locality?

A. I took a reference from the end of seven thousand nine hundred and one and four tenths poles on our line north seventy one and three fourths east thirty six and eight tenths poles to a planted stone in Michael Feather's field, pointed out by him as the beginning corner of the tract called Diadem, and the same point indicated on the map of W. McCulloh Brown by black letter E.

(By Mr. Sincell):

384th Q. Where did you start that reference line?

A. At F3.

Exception to the evidence as to the location of this reference line, because the same is not located on the plat.

The Witness: This stone is indicated on map No. 1 by red letter and figure "F 3."

(By Mr. Price:)

385th Q. Did you say it was the Mike Feather's field?

A. Yes, sir.

386th Q. Where was his line fence east of that?

Exception because there is no line fence located upon the plat.

A. I do not believe I have a reference to his line fence. I do not think his land is fenced to the line quite.

387th Q. I notice on your map the words "Joseph Feather, 451." What does that indicate?

A. It indicates the land owned by Michael and Wesley Feather at this time.

388th Q. Did you locate that or lay it down from any deed or paper?

A. I laid it down from a description in the deed in Mr. Feather's possession, of which I have a copy.

Exception to the evidence as to the location.

389th Q. What deed is it? Describe it.

A. It is a deed from John Crane's heirs to Joseph Feather, dated May 4th, 1864, recorded in Book 49, page 243.

390th Q. Will you file with your deposition a certified copy of that deed?

A. I will, marked 'Monroe Ex. No. 16.'

391st Q. I notice on your map the word 'Spring' just south of the Joseph Feather four hundred and fifty-one acre tract. What does it indicate?

A. That indicates a spring in the town of Cranesville, located by Mr. Brown in this case, which point is indicated on the map made by Mr. Brown in this case by a small circle with the word 'Spring' underneath.

392nd Q. Where is the town of Cranesville?

A. The larger portion of that town lies directly northwest of this spring.

Exception because the town of Cranesville is not located on the plat.

393rd Q. What size town is that?

A. It is a small village of perhaps two hundred people.

394th Q. Does it extend as far east as Mike Feather's house?

A. No, sir.

395th Q. Does it extend as far east as the line represented by the Michler line?

A. No, sir.

396th Q. How far is it from that spring to the military lots laid out by Frances Deakins, as you have located them?

A. I should think in the neighborhood of two hundred and forty poles.

397th Q. Did you locate any other houses in that neighborhood?

A. At the end of eight thousand one hundred and seventy poles on our line we passed eighteen poles east of Ethbell Falkenstine's house.

398th Q. How is that house indicated on the map?

A. This house is indicated on the map by the word 'Falkenstine' and a small square dot.

399th Q. What other houses did you locate?

A. At eight thousand two hundred and thirty poles we passed one and eight-tenths poles to the left of George H. Falkenstine's barn. This point is indicated on the map by a small square dot and the figures '8230'. I have some references here. Do you want them?

400th Q. Please give any other references you have taken to points in that locality?

A. At the end of eight thousand two hundred and sixty poles on our line I ran south eighty-seven degrees and five minutes east twenty four and one fourth poles, north eighty three degrees east at forty five and one tenth poles on this line passed thirty-five hundredths of a pole to the right of a planted stone claimed by Notley Browning to stand in the old Maryland and Virginia state line, and as a corner of the Henry Banks eight thousand acre survey. This point is indicated on the map by the red letter F and figure 4. Continuing this line seventy two and eight tenths poles in all to a stone pile pointed out by Notley Browning as a corner of military lot number fourteen hundred and sixty three. This point is indicated on the map by the red letter and the figure 'F5'. At the end of eight thousand four hundred and forty four and seventy five hundredths poles, on our line, we passed eighty one and fifteen hundredths poles east of a large stone monument on Fike's hill, believed to stand on the Maryland line. This monument is indicated on the map by the words 'Fike's Hill Monument', and a small square on a line representing the Michler line."

We also call attention to the testimony of Marcellus Albright, found on pages 1590 to 1596. He testifies that he now lives at Terra Alta, but formerly lived on a farm near Cranesville, and before that, lived at his father's mill in Cranesville. He sold his farm to Jacob C. Wolfe. He then testifies as follows:

"36th Q. Where did you get that land?

A. From my father.

37th Q. Where did he get it from?

A. He got it from John Crane, my grandfather.

38th Q. Your mother was a daughter of John Crane, was she?

A. Yes, sir.

39th Q. Do you remember your grandfather?

A. Yes, sir.

40th Q. Where did he live?

A. He lived on this big farm that we were speaking of, that we had the line through.

41st Q. This new line—that is, the line out in 1859, ran through John Crane's farm?

42nd Q. Yes, sir; both lines ran through his farm, the two old lines.

43rd Q. Was his residence east or west of the Michler line?

A. That was west.

44th Q. About how far?

A. Well, it was forty or fifty rods, I suppose, or may be more.

45th Q. What quantity of land did he own in there?

A. Oh, I could not tell you. He owned a big scope of it at that time.

46th Q. Could you give an estimate?

A. No, I could not. I do not remember what his farm contained, and then he owned four or five thousand acres in the mountain there, and he owned the farm that Sol Feathers now owns, and he owned the farm that Doe Hartman owned when Doe owned it, the one that Hen. Spindler and Ringer own now, and he owned my farm that I had, and I don't know how many more there, a big scope of land that he had the whole business of about.

47th Q. How long did John Crane live there and own this land?

A. Well, he moved there before my time, and I think he died in 1858 or 1859. I ain't positive which.

48th Q. Well, he lived there from your earliest recollection

A. Yes, sir. He lived there from my earliest recollection.

49th Q. Did he hold his land under a Virginia or Maryland title?

Objected to by counsel for State of Maryland.

A. As far as I know it was a Virginia title.

50th Q. Did he claim to be a citizen of Virginia or Maryland?

A. Yes, sir.

51st Q. Of what?

A. Of West Virginia.

52nd Q. And before the war, before West Virginia was created, of what state?

A. Why, it was old Virginia.

53rd Q. Did he vote in Maryland or Virginia?

A. Voted in Virginia, I suppose. I do not remember about that, but he always claimed his residence in Virginia.

54th Q. And where have you claimed your residence always?

A. Well, since the new state, in W. Virginia.

55th Q. Before?

A. Why, it was in the old state.

56th Q. Of Virginia?

A. I have voted at the—that was my first vote, for the new state.

57th Q. The first vote you voted was for the creation of the state of West Virginia?

A. Yes, sir.

58th Q. Where did you vote then?

A. At Brandonville.

59th Q. Brandonville, what county?

A. Preston county.

60th Q. And the votes you have cast since then have been in West Virginia, have they?

A. Yes, sir; well, I left here—

61st Q. Did you vote for officers of West Virginia and of Preston county?

A. Yes, sir.

62nd Q. Where did you pay your taxes?

A. Paid it in Preston county.

78th Q. You spoke about old Mr. John Crane's residence being west of the Michler line. Is that correct?

A. I think it is. Now let's see—

79th Q. Where was that house with reference to where Mike Feathers now lives?

A. Right the same place.

80th Q. John Crane's residence was right where Feathers lives?

A. He built part of it on the old foundation.

81st Q. That was where Feathers lived in 1895 and 1896 and along there?

A. I do not remember whether he was living there then. His son is. I forgot when he died, but his son owned it.

82nd Q. Did he live there up to the time of his death?

A. Yes, sir.

83rd Q. He lived at the same place where old John Crane lived?

A. Yes, sir; but I would not be positive now, but it runs in my mind that he was west of the line that was cut through."

It appears therefore, from this testimony that this Diadem is not only covered by West Virginia patents, but that so far as it lies west of the old Deakins line it has been in possession of parties claiming under these West Virginia titles, and not under the Diadem, and that the village of Cranesville, Preston county, West Virginia, consisting of some two hundred people, is located within the bounds of this Diadem tract; this village being a voting place in West Virginia, and all these people claiming to live in that state. The fact that the town of Cranesville lies within the Diadem is shown by Mr. W. McCulloh Brown's testimony, (page 1063 of the Record):

"Q. Now, tract D. O. in which the word 'Spring' occurs, what does that represent?

A. That portion marked D. O. within the lines was merely laid out in town lots, the town of Cranesville, lying principally within that portion of the Diadem.

Q. Does the town of Cranesville lie wholly within D. O.

A. The town principally I think does.

Q. Would Browning's store be in there?

A. It would.

Q. And the Van Meter Hotel?

A. It would.

Q. Do you know by whom those lots were laid out?

A. No, I don't.

Q. Or when?

A. No, I do not know when, some years ago, though, I understand.

Q. Well, was there any lots laid out south of the Diadem?

A. Not to my knowledge.

Q. Did you have before you the plot of the town as originally laid off?

A. No.

Q. Do you know whether the plot conforms to the line D. O. to the lines of D. O.?

A. Well, one of the lines of tract D. P. calls for the lines of these lots."

We call attention further to the fact that in addition to these surveys covering the Diadem, there lies south of it the Virginia patent granted to Honore Martin and John Hoye for 3600 acres, surveyed November 16, 1800, which survey extends from the old Maryland or Deakins line westward and includes nearly all the territory as far west as Brown's Potomac line. (See Monroe's Maps Nos. 1 and 2.) There also lies north of this Diadem tract the Virginia patent to Henry Banks for 8000 acres, dated July 27th, 1805, according to a survey dated October 24th, 1799. This Banks survey of 8000 acres extends further east than the old Virginia line is recognized south of it, and considerably further east than the line run by Mr. Monroe in 1894. It does not extend quite over to the line of the Military lots, as will appear from Monroe's Map No. 1 and Map No. 2, but the location of this Banks survey is well established. It, or a large portion of the southern part of it, was owned by John Crane. The extent and location of the lands of John Crane is shown by the map filed in this cause as "Monroe Exhibit No. 24," found in the printed Record between pages 1804 and 1805 This map is an exhibit in the chancery cause of John Crane's Administrator v. John Crane's heirs, in the circuit court of Preston county, in equity. This was the chancery suit in which certain lands of John Crane were sold after his death. The original map of which this is a copy, was made by Reuben Morris under the order of the Court in that cause prior to the year 1878. This copy is certified as correct by Smith Crane, Clerk, under date of January 31st, 1879. It shows the lands of Crane's heirs at that time within the Henry Banks 8000 acre survey, and various parcels which had been sold off as well as adjoining lands. It also shows the old Maryland line and the Deakins line, showing that these lines were well known and recognized at that time. And the fact that these lands were disposed of under the decrees and jurisdiction of the circuit court of Preston county, West Virginia, shows that the Crane heirs recognized that these

lands were located in West Virginia and not in Maryland. A portion of these lands were sold to N. B. Browning. They are shown on this map, exhibit No. 24; one tract, No. 1, of 1009 acres, and another tract, No. 2, of 1210 3-4 acres, and another tract, No. 7, of 487 acres. The deeds to Browning are found on pages 1527, 1528 and 1531. The first deed to which we call attention is found on pages 1528, 1529 and 1530, and is from Smith Crane, Special Commissioner, to Notley B. Browning, dated November 24th, 1875, and is made under a decree of the Circuit Court of Preston County made April 12th, 1873, in the suit in equity therein pending, in which said Smith Crane, surviving administrator of John Crane, deceased, was plaintiff, and Nancy Crane, widow of said decedent, and his children and heirs at law, and William G. Brown were defendents. He conveys lot No. 1, as shown on this map, Monroe Exhibit No. 24, containing 1009 acres, also lot No. 2 shown on map containing 1210 3-4 acres. Lot No. 1 is described as follows:

> Lot No. 1:—Beginning at pointers *in the old Maryland and Virginia line* and in the fourth line of the 'Diadem survey' (and twelve poles from the fourth corner of 'Diadem' in the line running south eighty three degrees west) and running *thence with the said Maryland and Virginia line* N. five hundred and sixteen poles (crossing White Rock Run) to two pitch pines, (standing about six and one half poles north of said Run); thence N. eighty degrees W. three hundred and twenty poles to pitch pine, corner to a parcel of land owned by John E. Otto; thence S. one degree W. (with a line of lot No. 2 hereby conveyed) four hundred and seventy two poles to a stone pile and pointers corner to said lot No. 2; thence with a line of the same south eighty three degrees E. forty three poles to pointers, corner to the Widow Metheney's farm, same course continued (with her line) fifty five poles to a stone on some high rocks; thence south twenty five degrees, E. (with another of her lines) one hundred and fourteen poles to a white oak, in the line of the 'Diadem' survey; thence reversing a part of the fourth line of the 'Diadem' viz: N. Eighty three degrees E. one hundred and eighty five poles to the beginning, containing one thousand and nine acres of land; being a part of the 'Henry Banks survey of eight thousand acres, (and is designated and known on the plat and re-

port of survey filed in this cause aforesaid, as lot 'No. 1.' "

Lot No. 2 is described as follows:

"Beginning at a pitch pine the third corner to said lot No. 1 and running thence S. fifty five degrees W. with a line of Jackson P. Rodeheaver and Arnest A. Rechat (crossing the head waters of Beaver Creek) four hundred and twenty five poles to a stone pile in a line of the Wakefield survey (now Reckert's); thence with three lines of the same viz: S. forty degrees E. thirteen poles to a rock and pointers; S. thirty five degrees W. two hundred and eighteen poles to stone pile and pointers, N. sixty two degrees W. one hundred and twenty poles to three chestnuts on a cleft of rocks (in the original line of the said Banks survey); thence with the Banks line S. forty seven degrees E. one hundred and ten poles to a stone heap, corner of said Banks survey, (originally a white oak, thence S. 6 p. to a stone pile in the Joseph Forman line of a tract of sixty acres, (now Washington Hartman's heirs); thence with two lines of the same viz: S. thirty eight degrees E. one hundred and seventeen poles to a stone pile and pointers, S. forty six degrees W. forty eight poles to two white oaks standing by the 'Cuppett road' thence E. ninety six poles to a white oak corner to the Jacob Wolf survey of 156 acres (now Zalmon Cuppetts); thence with two of Cuppett's lines, viz: S. forty one degrees E. ninety eight poles to a hickory bush in the edge of Cuppett's field, S. sixty three degrees E. twenty poles to a stake in the edge of Cuppett's field; thence N. eighty six poles to a stone pile and pointers; thence east one hundred and fifty five poles to a stone pile; thence S. forty degrees E. fifty four poles to David Wolf's corner, (between two rocks); thence with four of said Wolf's lines, viz: N. thirty one degrees E. thirty nine poles to a birch on a high rock; thence N. sixty five and one half degrees E. twenty three poles to a chestnut oak, 1 N. eighty four degrees E. fifty five poles to a chestnut N. sixty three degrees E. thirty four and one half poles to a chestnut oak corner to said Wolf and the Widow Metheny, thence N. fifteen degrees E. one hundred and twenty five poles to pointers corner to said lot No. 1; thence reversing two lines of lot No. 1, viz: N. eighty three dgrees W. forty three poles to a stone pile and

pointers (corner to said lot No. 1); thence north one degree E. four hundred and seventy two poles to the beginning containing twelve hundred and ten and one three fourths of an acre of land; being also a portion of the said Banks survey of eight thousand acres; and is designated and known on the plat and report of survey aforesaid as lot No. two (2)."

These lots Nos. 1 and 2 are described as portions of the Henry Banks survey of 8000 acres. It will be noted that lot No. 1 calls to begin at pointers in the old Maryland and Virginia line and in the fourth line of the Diadem survey and twelve poles from the fourth corner of Diadem in the line running south 83 degrees west and running thence with the said Maryland and Virginia line north 516 poles to two pitch pines, etc. *Mr. Monroe, in locating this Banks survey, has accepted Mr. Brown's location of the Diadem* and placed the beginning corner of this Lot No. 1 out of the Banks survey on the fourth line of the Diadem twelve poles from the corner of the line running south 83 degrees west, so that in this case the state of Maryland cannot dispute the proper location of the Banks survey. Mr. Monroe's testimony upon this point is found on pages 1668 to 1671, inclusive, and is as follows:

434th Q. Going northward from the locality about which we have recently been speaking, what, if any, large tract of land did you locate—designate on your map?

A. I located the Henry Banks 8000 acre survey —or laid down the Henry Banks 8000 acre survey.

435th Q. Did you run out its lines on the ground?

A. I did not.

436th Q. How is it designated on the map?

A. By the words 'Henry Banks, 8000 acres,' enclosed by a solid black line.

Exception.

437th Q. Give the reason why you have placed it on the map in the manner in which it appears?

A. It is placed on the map from data secured from a certified copy of a survey and subdivision by Reuben Morris and also a certified copy of a map accompanying said report. This tract is laid down substantially as indicated on this map, with the exception of the southern line, which is laid down to conform to the stone corner as pointed out by Notley Browning.

438th Q. Will you file that report and map with your deposition?

Objection to the introduction of this copy of the map on the ground that it is not a properly certified copy.

A. I will. They are marked Monroe Exhibits Nos. 24 and 25 respectively.

439th Q. Who was Reuben Morris?

A. At that time he was assistant surveyor of Preston county, of James G. Crawford, surveyor of Preston county.

440th Q. Where did he live?

A. About two miles south of Kingwood.

441st Q. Is he still living?

A. No, sir.

442nd Q. How long has he been dead?

A. He has been dead ten or fifteen years, I suppose.

443rd Q. What was his occupation?

A. He was a surveyor.

444th Q. What do you know about his practice as a surveyor in this county?

A. I know he did a great deal of the surveying in Preston county.

445th Q. Are you familiar with his handwriting?

A. I am.

446th Q. Referring to the report which you have filed as Ex. No. 25, in whose hand*wir-ing* is the signature to that report?

A. I believe that to be the signature of R. Morris. I have no doubt of it, in fact.

447th Q. I now hand you a certified copy of a patent from the commonwealth of Virginia to Henry Banks for 8000 acres, dated July 27th, 1805, and will ask you to file same with your deposition.

A. I will do so, marked 'Monroe Ex. No. 26.'

448th Q. Do you understand that the land granted by that patent is the same land indicated on your map as the Henry Banks 8000, and covered by the report and map in the Crane case about which you have testified?

A. I do.

449th Q. This patent calls to run with or near Col. McCleary's lines 784 poles, crossing pine swamp run, and some other drains to five white oaks in the Maryland line, and with it north 1780 to a double chestnut by the new road. Where is the point on your

map at which the white oaks in the Maryland line are called for in that description?

A. At the point indicated on the map by the red letter and figure F4.

450th Q. Is that the same point that was pointed out to you by Notley Browning?

A. It is.

451st Q. From that point the call is to run north 1780 poles with the Maryland line to a double chestnut by the new road. Where would the end of that north line be indicated on your map?

A. That point is indicated on the map by the red letter and figure 'G1'.

452nd Q. Going north from the point on your line corresponding to the point indicated by red letter 'F4', what references do you take from your line?

A. At 8945 poles on this line, we crossed the line fence between Notley Browning and John Ad. Reckard.

453rd Q. Where is that point indicated on your map?

A. That point is indicated on the map by the red letter and figure 'F7', at about 28 miles on this line we passed west of John Ad. Reckard's dwelling house. I did not take the exact measurement at his house.

454th Q. I hand you a certified copy of a deed from Jonas DeBerry and wife to John A. Reckard, dated December 17th, 1880, and filed with the deposition of Amanda J. Reckard, in this cause, as exhibit No. 9, and I will ask you whether you have laid down that tract of land on your map?

A. I have.

455th Q. How is it indicated?

A. It is indicated on the map by the dotted lines enclosing the word 'Reckard 140, and the figures and letters '28 M' which represents 100 acres of the 140 acres owned by J. A. Reckard.

456th Q. What reason had you to believe that that tract lies as you have indicated?

A. It calls to begin at a stone pile in the old Maryland 169 poles north of two pitch pines standing 16½ poles north of White rock run. These pitch pines, I understand to be the same pines called for in the description of lot No. 1 of Reuben Morris's report of survey in the case of John Crane's administrator vs. John Crane's heirs at the end of the first line of said description, which is as follows: 'Beginning at pointers in the old Maryland and Virginia line (in the

fourth line of the Diadem survey and 12 poles from the fourth corner of the Diadem running south 83 west) and running thence with the said Maryland and Virginia line north 516 poles (crossing White Rock Run) to two pitch pines standing about 6½ poles north of said run.' The two pitch pines called for are indicated on the map by red letter F, figure 8.

457th Q. In the deposition of Mrs. Amanda J. Reckard, wife of John A. Reckard, taken in this cause, before you as notary public, I believe at her residence—where was that residence located with reference to the reference line you were running north from the Fairfax stone?

A. It is located east of that line, I should judge 40 or 50 rods; on the 100 acre tract above referred to.

458th Q. You did not accurately locate that house by survey did you?

A. I did not.

459th Q. Will you indicate its location on the map approximately, as you remember it from having been there?

A. This house is indicated approximately on the map by a small square dot, and the red letter 'F9'.

Objection by counsel for the State of Maryland to the method of location.

The further taking of these depositions is adjourned until tomorrow at the same place, at 8:30 o'clock, A. M."

The other deed to Notley B. Browning from Smith Crane, Special Commissioner, is found on page 1527, and is dated November 24th, 1875, and is recorded in Preston County, West Virginia, in Deed Book 16, page 366. It conveys lot No. 7, containing 487 acres. It calls for the same two pitch pines, corner to Lot No. 1 conveyed to said Browning, and *also calls to run to pointers by a rock in the old Maryland and Virginia line;* thence with the latter line South 276 poles to the place of beginning. And it also conveys Lot No. 8½, which lies farther North, adjoining the Elder Spring tract and corner to the Henry Deahl survey, and *calls for a stake in the old Maryland and Virginia line,* and thence with the same South 380 poles to pointers by rocks, corners to Lot No. 7; thence with a part of a line of Lot No. 7 West 150 poles to the new Maryland and Virginia line as run by Lieutenant Michler in 1859; thence with said new line, being a line of Lot No. 8, now owned by George H. Rhodeheaver, to the Elder Spring tract, etc.,

containing 242 acres. The description of said lots in said deed is as follows:

> "Lot No. 7: Beginning at two pitch pines, corner to Lot No. 1 (this day conveyed to said Browning by said Special Commissioner) thence with a line of said Lot No. 1 N. eighty degrees, west three hundred and twenty poles to the pitch pine, corner to lots Nos. 1 & 2; thence with two lines of lot No. 6 (now owned by John E. Otto) viz: N. one degree E. two hundred and twenty-six poles to a stake; thence E. fourteen poles to a line of the 'Carey survey' thence with a line of the same E. two hundred and ninety five poles *to pointers by rock in the old Maryland and Virginia line; thence with the latter line S. two hundred and seventy six poles to the place of beginning,* containing four hundred and eighty seven acres of land; being a part of the Henry Banks' survey of eight thousand acres and is designated and known on the plat and report of survey filed in the cause aforesaid as lot No. 7. Lot No. 8½ (hereby conveyed) is bounded as follows: (being that portion of the 'Carey survey' *lying between the old and new Maryland and Virginia lines*) beginning at a gum, corner to the 'Elder Spring tract' and also a corner to the Henry Deahl survey; thence S. thirty seven degrees E. forty six poles to a double white oak (standing on the south side of the Selbysport road:) thence S. seventy seven degrees W. sixty eight poles *to stake in the old Maryland and Virginia line; thence with the same S. three hundred and eighty poles to pointers by rocks,* corners to said lot No. 7; thence with a part of a line of lot No. 7 W. one hundrd and fifty poles to the new Maryland and Virginia line, (as run by Lieut. Michlee in 1859;) thence with said new line (being a line of lot No. 8 now owned by George H. Rodeheaver) to the 'Elder Spring tract; thence with two lines and a part of another line of the said 'Elder Spring tract' viz: N. seventy seven degrees E. fifty two poles, N. forty one degrees E. forty poles, N. seven degrees W. Ninety poles to the beginning, containing two hundred and forty-two acres, designated and known on the plat and report of survey aforesaid as lot No. 8½".

It is apparent from the description of this Lot No. 8½ that it lies between the Michler line and the old Deakins line entirely, and it is further apparent that the two lines are 150 poles apart

at this place. (See map, Monroe Exhibit No. 24, between pages 1804 and 1805.)

Mr. Notley B. Browning was examined as a witness in this case. His evidence is found on pages 1450 to 1457, and is as follows:

"Notley B. Browning, a witness produced on behalf of the state of West Virginia, being duly sworn, deposes as follows·

Examination by Mr. Price:

1st Question. What is your age?

Answer. I will be 57 in next December.

2nd Question. Where do you reside?

Answer. Cranesville, West Virginia.

3rd Question. What is your occupation?

Answer. Well, at this time, the timber business is my occupation, now.

4th Question. Do you own any land on the West Virginia side, adjoining the boundary line, between the states of Maryland and West Virginia?

Answer. Yes, sir.

5th Question. Of what original tract is your land a part?

Answer. It is the southeastern part of the Banks survey, you may say.

6th Question. Is that the Henry Banks survey of 8000 acres?

Answer. Yes, sir.

7th Question. From whom did you derive title to the portion of the Banks survey which you now own?

Answer. From John Crane's heirs, through Smith Crane, the commissioner.

8th Question. About how long have you owned it?

Answer. I have owned it since—about 2100 acres of it—since 1874, and about 1000 acres more, I bought in 1875.

9th Question. How much do you own altogether now?

Answer. About 2600.

10th Question. In one body?

Answer. Yes, sir.

11th Question. How far does it border upon the state line?

Answer. 710 poles, I guess it is. I think that is right. 710 I think is right, on the old Maryland line.

12th Question. Do you know where the new Michler line runs through your land?

Answer. Yes, sir.

13th Question. Is there any monument or other thing to indicate where that line is?

Answer. Yes, sir.

14th Question. What kind of a monument is it, and where is it?

Answer. It is a stone about four or five feet high, right on the top of what is called Fike's Moutain.

15th Question. Do you know where the line was run by Julius K. Monroe, surveyor in this case, through your land in the fall of 1894?

Answer. Yes, sir, I know. I seen him run part of it, and saw where he run the balance.

16th Question. You have spoken of the old Maryland line—is that old Maryland line east or west of where Mr. Monroe run through your land?

Answer. East.

17th Question, About how far east?

Answer. I think it is something close to 80 rods. Close that I know.

18th Question. Is Mr. Monroe's line east or west of the new Michler Maryland line?

Answer. Why, Mr. Monroe's line is east of the Michler line.

19th Question. About how far east?

Answer. Something like, not far from 70, I guess, between 60 and 70, I guess.

20th Question. To which of these lines, the Michler line, the Monroe line, or the old Maryland line, do you hold possession and title?

Answer. To the Deakins line, called the old Maryland line, or known as that anyhow.

21st Question. Are there in Maryland military lots lying opposite your lands?

Answer. Yes, sir.

22nd Question. Do they adjoin your lands on the east?

Answer. Not quite.

23rd Question. What is the distance between your line, and those military lots?

Answer. I never measured the distance of any, but a block of lots that comes in on the north side of the Diadem to strike this line it is 19 rods, from that corner to this Deakins line.

24th Question. Is the old Maryland line, the same as the Eastern boundary of those military lots, as you recognize it?

Answer. No, sir.

25th Question. It is some 19 poles west of the military lots?

Answer. Yes, sir, but some places they run the lots in 16 rods of this line, down further down, but it should be a parallel line.

26th Question. Who owns the strip of land between the military lots and where you claim the line to be?

Answer. Elijah Friends, and a man by the name of Percy. Percy and Friends I guess would cover it.

27th Question. Do they claim that land under a Maryland or Virginia title.

Answer. A Maryland title.

28th Question. Do you claim your land up to that old line altogether under a Virginia or a Maryland title?

Answer. Virginia title. The taxes have always been paid on it, since it was patented, from what I can learn, in Virginia. I paid my taxes always in Virginia.

29th Question. Your lands are assessed in West Virginia. Preston county, and you pay taxes on that whole body.

Answer. Yes, sir.

30th Question. Who then has had the exclusive, uninterrupted possession of the land along that portion of the Maryland line, west of the old Maryland line, since you have known it?

Answer. Right along the line you mean?

31st Question. Yes.

Answer. As a general thing, Virginia—

32nd Question. I mean your tract?

Answer. Oh, mine. Of course, Virginia, altogether, as far as to this Friend tract.

33rd Question. Have you yourself had possession and claimed up to that old Maryland line, ever since you have owned the land?

Answer. Yes; never been dispossessed of a tree or anything else.

34th Question. Is there any fence along the old Maryland line, bounding upon your land?

Answer. There is 40 rod that I placed there directly after I bought it, cleared 10 acres, and put a fence of 40 rod on the line.

35th Question. That was shortly after 1874?

Answer. Yes, sir; that was '75 or '76 that was put there.

36th Question. And that fence has remained there from that time to this?

Answer. Yes. I wouldn't be sure about it, but it is something along there, about 1876.

37th Question. Is there any house on your land?

Answer. Yes, there is a farm cleared out there, where I spoke of this fence, a dwelling house and out-buildings.

38th Question. Is that house between the new line, and the old line or not?

Answer. No, sir; that house is just on the west side of the Michler line, a little bit.

39th Question. Is any of the cleared land between the lines?

Answer. Yes, sir; it is cleared all between the Michler and the Deakins lines. I reckon there is not over an acre that is cleared, that is outside of them lines.

40th Question. Did you sell any part of the Banks land to any person along the Maryland line?

Answer. Yes, sir.

41st Question. To whom have you sold parts of the land?

Answer. The first part I sold, I sold to Jonas DeBerry for his son-in-law, John A. Reckard, 140 acres.

42nd Question. Where does that 140 acres lie, with reference to the Maryland line?

Answer. It lies right between the two lines, between the Deakins and the Michler line, bounded on both.

43rd Question. Who has possession and claim of title to the tract that you sold [illegible]

Answer. Reckard.

44th Question. Does he live on it?

Answer. Yes, sir.

45th Question. How long has he lived on it?

Answer. Something about 17 or 18 years I think. I cannot just exactly tell. It may be longer than that, too, but it is about that.

46th Question. Do you know whether that Reckard land is assessed in Maryland or West Virginia?

Answer. In West Virginia, and pays the taxes in West Virginia.

47th Question. Do you own any other land in that locality that was patented to any one else, besides the Henry Banks land?

Answer. Yes, sir; I owned the biggest portion of the Carey survey of 500 acres.

48th Question. Do you know to whom that piece of land was patented originally?

Answer. To Frances and William Deakin, by the state of Virginia.

49th Question. What is the date of that patent for that 500 acres to Frances and William Deakins?

Answer. The 9th day of September, 1790.

A certified copy of said patent is filed with this deposition marked Exhibit No. 4.

50th Question. Did you own the whole of that tract of land?

Answer. No, sir; I owned just what laid between the Deakins and Michler lines.

51st Question. From whom did you get it?

Answer. I bought it from John Crane's heirs, through Smith Crane, commissioner for the heirs, who sold *it* as a commissioner.

52nd Question. How many acres did you have in there, do you remember?

Answer. 487 acres.

53rd Question. Do you still own that land?

Answer. No, sir:

54th Question. To whom did you convey it?

Answer. I sold 110 acres of it to Calvin Fraze. It is owned now by Henry Sines.

55th Question. When did you sell that piece to Calvin Frazee?

Answer. In 1883.

56th Question. Is there any dwelling house upon that piece of land that you sold to Frazee?

Answer. Yes, sir.

57th Question. How is it located with reference to the boundary lines?

Answer. It is some 20 or 30 rods I think, west of the boundary lines, to my recollection. It is not over that I don't think, about 30 rods west of the Deakins line.

58th Question. Between the new Michler line, and the old line?

Answer. Yes, sir.

59th Question. How long has that house been there?

Answer. He built the house immediately after he bought it, right away.

60th Question. And occupied it ever since, as a dwelling house?

Answer. Yes, sir, it has been occupied ever since.

61st Question. Is that piece of land assessed in Maryland or West Virginia?

Answer. In West Virginia.

62nd Question. Did you sell any other part of the land to anybody?

Answer. Then I sold a piece to Samuel Faulkner of eighty some acres, about two years after I sold that. I haven't got his title bond. It was paid for, when he bought it.

63rd Question. Does anybody live on the Faulkner piece?

Answer. Yes, sir; a man by the name of William Sisler. I think William is his name.

64th Question. Does he live on it now.

Answer. Yes, sir, he did a few months ago.

65th Question. Did you sell any other part of that land?

Answer. Yes, sir; I sold the north end of the piece to John H. Friend, the balance of the Carey tract.

66th Question. Do you know where there is located an old Maryland tract called the Elder Spring?

Answer. Yes, sir: I know several lines of the tract. I have never been all around it.

67th Question. These pieces of land that you sold to Friend and Faulkner, did they cover any part of the Elder Spring tract?

Answer. No, sir; I think not. I think the Elder Spring tracts are separate tracts, if I am not mistaken. Annanias Shroyer, first bargained for the Faulkner tract, and he failed in it, some way. It is the Sisler tract now. It has passed through three hands, since I sold it, but Sisler is on it now, and owns it.

68th Question. You sold that 100 acres to Annanias Shroyer, November 10th, 1881, did you not?

Answer. Yes, sir. He did not get the 100 acres, but he bargained for it. It will be all the same.

69th Question. The land then you sold to Friend and Faulkner lies between the Elder Spring tract, and the old Maryland line, does it not?

Answer. Yes, sir. Also between the Miehler and the old Maryland line.

70th Question. The persons who purchased from you—do they claim still to hold that land under a West Virginia title, and pay taxes in West Virginia?

Answer. They do, all of them, unless it is

Friend. He wanted me to make him a Maryland deed. I have got a patent in Maryland on that as well as in Virginia, took out a Maryland patent on all that land, and he wanted me to make him a Maryland title, and I wouldn't do it, told him it had always been held under Virginia, and it should remain that way. I have both.

71st Question. When did you take out a title in Maryland for that land?

Answer. I took out my warrant in Maryland in 1874, may be '73, '74 anyhow, not later than '74. Crane and me had a kind of a bargain when I bought the land. He advised me to do that, said he didn't think I would have any trouble, but to keep lawsuits and everything off. That is the way I came to do it.

72nd Question. Do you know in which state the persons now living upon those portions of the land, which you have said you sold, vote?

Answer. They vote in West Virginia, everyone of them. I am confident of that. I have been talking to a good many of them. Savage—I never talked to him about the matter, but then I have understood he does. Then I know of their paying their taxes, because I have been bothered a little about it. The sheriff came on to me a time or two about the taxes. They had just neglected to pay it, and they sent me a note, and I seen about it. They had old tax receipts, several of them, and just went and paid it. So I know where they are paying their taxes. I don't know so much about Savage, as I know of these other fellows this way.

73rd Question. How long have you lived in the neighborhood of this Henry Banks 8000 acre survey?

Answer. I have lived here over 56 years. At least they tell me I was born around here.

74th Question. Who was your father?

Answer. James Browning.

75th Question. What line has been recognized and accepted, as the state boundary line, by the people in this neighborhood, as long as you recollect it?

Answer. Well, I recollect it always being known and called as the old Maryland, or Deakins line, both. It is recognized, used to be, as the old Maryland line, and a great many people since I have grown up, now call it the Deakins line. It is used by both.

76th Question. How far northward has that old

Maryland line been recognized, as you have stated?

Answer. Why, to the Pennsylvania line. That is about 12 miles from here, I guess.

77th Question. How has the line been recognized southward, from the banks title?

Answer. It has always been, so far as I know, with a few exceptions, since the Michler line was run,—there has been a little cross-cutting on the southward part of it, but it has always been recognized—I have been up in the wilderness to the West Virginia Central road, and I have been to the Fairfax stone, and they always recognized it principally through there, they told me, the old line. Before the Michler line was run of course they had nothing else to go by. It wasn't a very straight line, I guess. That is the only line they ever knew anything about, and the only line that was recognized I guess as the boundary, until the Michler line was run.

78th Question. I asked you in the earlier part of your examination, what was the distance between the new Michler line, and the line as run by Mr. Monroe, and also the distance between the Monroe line, and the old Maryland line. Have you refreshed your recollection about that matter?

Answer. Why, from what I understand now, that should be reversed, 70 rods from the Deakins line to Mr. Monroe's, and about 80 from his line to the Michler. I just got it in my head the other way, but now since I think of it, he was a little over half way to the Michler line.

79th Question. Have you examined the preliminary map made by Julius K. Monroe?

Answer. Yes, sir.

80th Question. Will you state whether the Banks 8000 acres, and the William Deakin 500 acres, appear to be correctly located on that map?

Answer. Yes, sir; it seems to be perfectly right, from what I can understand of it anyhow.

Certified copy of a deed from Smith Crane, commissioner, to Notley B. Browning, dated November 24th, 1875, and recorded in Book No. 42, pages 25 to 27, in the office of the county clerk of Preston county, is filed with this deposition, and marked Exhibit No. 5.

A certified copy of a deed from Smith Crane, commissioner to Notley B. Browning, dated November 24th, 1875, and recorded in Deed Book No. 42, pages 27 to 30, in the office of the county clerk of Preston

county, is filed with this deposition, marked Exhibit No. 6."

Elder Spring.

The next Maryland survey located by Mr. Brown, extending West of the Michler line, is Elder Spring. It is located by both Mr. Brown and Mr. Monroe practically at the same place. This Elder Spring patent is completely covered and included within the bounds of the Henry Banks patent for 8000 acres, filed in this cause as "Monroe Exhibit 28," (Record, page 1806.) The description in the patent is as follows:

"There is granted by the said Commonwealth unto Henry Banks a certain tract or parcel of land containing 8000 acres by survey bearing date the 24th day of October 1799 lying and being in the County of Monongalia, adjoining the land of Anthony Worley. The new road that leads to John Triner *the Maryland line* and the lands of William McCleery at the pine swamp and bounded as followeth. To wit. Beginning at a white oak in Anthony Woods line near the new road and running S. 35 degrees E. 249 poles crossing said Worley's mile run to a white oak S. 25 degrees W. 886 poles crossing several branches to a chestnut oak E. 72 poles along the side of Beaver Creek hills to a white oak S. 12 degrees W. 69 poles *corssoing* Beaver Creek to a large red oak S. 25 degrees E. 180 poles to a red oak Line Cross's line S. 16 degrees W. 364 poles *corssing* several branches of Muddy Creek to a pine S. 51 degrees E. 40 poles of a branch to a pine S. 16 degrees W. 128 to three chestnuts on the top of Muddy Creek hills S. 47 E. 164 poles along side of hill to white oak S. 112 poles to a sugar tree in Robert Foreman's line N. of the pine swamp knoll then with or near Colonel McCleery's lines 784 poles *corssing* Pine Swamp run and some other drains *to 5 white oaks in the Maryland line and with its N. 1780 to a double chestnut by the new road* then W. 80 poles to three white oaks N. 50 degrees W. 76 poles to a chestnut or near Samuel Hendricks line W. 280 to a red oak. S. 50 degrees W. 120 poles to two white oaks W. 104 poles to a chestnut N. 60 degrees W. 64 poles to a white—in or near John Archer's line then W. 116 poles to the beginning with its appurtenances."

By an examination of Monroe's Map No. 2, it will be seen that this Henry Banks patent for 8000 acres extends considerably North of the Elder Spring tract and also East of it. We have shown that this tract is correctly located. This is also apparent from the map marked "Monroe Exhibit No. 24" found in the Record between pages 1804 and 1805, being the map prepared by Reuben Morris of this 8000 acre patent, with the holdings and sub-divisions within the same. And as showing that this was regarded as Virginia territory, other Virginia patents, junior to the Banks 8000 acres, have been granted for the land on all sides of the Elder Spring, not only West, North and South, but also East, between the Elder Spring tract and the Old Maryland, or Deakins line, and the proof, we think, shows that the people owning the Elder Spring tract, or portions of it, have claimed to reside in West Virginia, and that said lands have been taxed in West Virginia. There is possibly one or two persons, who, in comparatively recent years, have attempted to transfer their allegiance from West Virginia to Maryland and claim now to hold the land as in that State; but this of course cannot affect the main question in the case, that prior to the bringing of this suit, the States of Virginia and West Virginia had jurisdiction and control over this territory covered by the Elder Spring patent. We will now refer to the evidence showing that the Elder Spring patent is surrounded on all sides by patents granted by the States of Virginia and West Virginia. By reference to Mr. Brown's map it will be seen that the Michler line runs nearly through the center of the Elder Spring tract, leaving about half of it on each side. On the East it extends hardly half way over to the Deakins line, or old Maryland line, as claimed by the people in that section, according to the testimony. This old state line along there is the Eastern line of the Henry Banks 8000 acres, as shown on Monroe's map No. 2. Now South of the Elder Spring tract is a junior patent for 500 acres granted by Virginia to Francis and William Deakins, dated October 9th, 1790, on a survey made December 1st, 1789. Upon this tract Mr. Monroe has noted the residence of P. Savage and another Savage and Sisler. P. Savage's Residence is East of the Michler line, but West of Monroe's line of 1894. The other Savage residence and the residence of Sisler are East of the Monroe line and near to the old line.

Mr. Monroe's testimony as to the location of this 500 acre patent is found on pages 1671 and 1672, and is as follows:

"460th Q. I hand you a certified copy of a patent from the Commonwealth of Virginia to Frances and William Deakins for 500 acres, dated October 9th, 1790, and ask you to file the same with your deposition.

A. I will do so, marked 'Monroe Ex. No. 27.'

461st Q. Is that 500 acre survey indicated on your map?

A. It is.

462nd Q. How?

A. By a tract marked 'F. & W. Deakins 500,' closed within the solid lines, and adjoining a tract of land called 'Elder Spring' tract, 411.

463rd Q. Is the Elder Spring a Maryland or Virginia grant?

A. A Maryland grant.

464th Q. Is it represented on your map No. 1?

A. It is.

465th Q. How?

A. By the tract of land enclosed in broken line, marked 'Elder Spring tract 441.'

466th Q. Is that tract also laid down on the map of Mr. Brown here in this cause?

A. It is.

467th Q. How does his location of it correspond with yours with reference to the Michler line?

A. Substantially the same.

468th Q. One of the calls of this 500 acre patent to Frances and William Deakins is 'North 70 west 76 poles to a bounded white oak and black gum, they being the beginning trees of aforesaid tract of land called 'Elder Spring.'

A That 70 west 76 poles is wrong, I reckon.

469th Q. We cannot correct it here. Please indicate on your map the position of that white oak and black gum, the beginning of the Elder Spring tract?

A. This point is designated on the map by the letters 'W. O.' and the word Gum, near the figures '9488.8.'

470th Q. The 500 acre tract just mentioned calls to begin at the end of 13 poles on the 14th line of a tract of land, called Elder Springs originally granted and patented by the state of Maryland unto the aforesaid Frances Deakins.' Indicate please, on your map that beginning point, 13 poles on 14th line of Elder Spring tract?

A. This point is indicated on the map by the red letter and figure 'G2.'

471st Q. Please give the common lines between this 500 acre tract and the Elder Spring tract.

A. The lines called for in this 500 acre tract common with the Elder Springs are south 51 east 43 poles, north 77 east 80 poles, north 41 east 40 poles, north 70 west 76 poles, to a bounded white oak and black gum. This line, I believe to be an error, as it should be about north 7 west 76 poles. My recollection is that it is exactly 7 west.

472nd Q. How is that line called for in the Elder Spring tract?

A. That line is the closing line of the Elder Spring survey, and has no bearing.

473rd Q. In order to close the Elder Spring survey about what course would it have to run?

A. About northwest—seven west.

474th Q. Instead of north 70?

A. Yes, sir. I think it is seven west. That is my recollection.

475th Q. Did you take any reference from your line you were running in the locality of this 500 acre Deakins survey?

A. I did. At the end of 9488.8 poles I ran north 56¼ west 29.95 poles to a black gum and white oak stump supposed to be the beginning corner of a tract of land called Elder Springs patent, to F. & W. Deakins in Maryland in 1774. This gum is still standing and well marked. The white oak stump is rotted down even with the ground. This point is marked on the map by the letters 'W. O.' and words 'and gum,' being the same point heretofore referred to, and the same point marked on the map made by W. McCulloh Brown in this case at black letter F. At 9097.4, crossed division fence, division line between J. A. Recard and Polk Sines. At 9280 poles set 29 mile stake about 20 poles east of Preston Savage's house, and about the same distance a little north west of Sisler's house. These houses are indicated on the map by the words 'P. Savage,' and a small square dot, and 'Sisler' and a small square dot.

Exception by Counsel for the State of Maryland.

The Witness: At 9392 poles reference stake standing about thirteen poles south west of Ezzra Savage and Asa Savage's houses. These houses are

represented on the map by two square dots and the word 'Savage.' At 9515 poles, passed about 25 poles east of S. Faulkner's house. This point is indicated on the map by a small square dot, and the letters 'S. Faulkner.' At 9528 poles passed three poles east of Preston Welch's new house. This point is indicated on the map by a small square dot and the letters 'P. Welch.' At the end of 9902.45 poles, I ran south 71 degrees 40 minutes west 16.27 poles to a point thought to be a corner of the tract called Elder Spring, and the Henry Deal survey of 367 acres. This point is designated on the map by the red letter and figure 'G3.' At about 9860 rods passed about 40 rods west of Marshall Friend's house. This distance, however, is estimated. This house is indicated on the map by a small square dot under the words 'Marsh. Friend.' "

It will be noted that this Elder Spring tract was granted by Maryland to Francis Deakins, assignee of William Deakins, the same persons who got the Virginia patent for 500 acres. This patent is "Exhibit Brown No. 28," (Record, page 724.) William Sisler's house, is located, as we have stated, on this tract of land between the Monroe line and the old State line. His testimony was taken and is found on pages 1476 and 1477 of the Record. It may be briefed as follows:

Witness is thirty-three years old, and owns a piece of land along the State line between Maryland and West Virginia, which he bought from Jeff Frazee six years prior to 1896. Frazee got his title from Faulkner. Faulkner got it from Friend. Friend got it from Shroyer, and Shroyer got it from Notley Browning. There is a house on that land which was built there by Mr. Frazee, in which witness lives. The land is assessed in Preston County, West Virginia. The old Maryland line is East of the land. It is the East side of the land. The new Maryland line is the West side of him; that is, the land lies entirely between the old and the new lines. Monroe's line went pretty near through the middle of it, West of the house about twenty rods.

Albert J. A. Savage was also examined. His evidence is found on pages 1477 to 1479. He testifies he is thirty years old, and lives on land between the two lines in West Virginia, owned by his father, Ezra Savage. He lives with his father There is 118 acres of the land. His father bought it

from John H. Friend. The deed is recorded at Kingwood. Friend bought the land from Notley Browning. Witness and his brother built the house on the land about nine years ago and his father has lived in it since it was built. The old Maryland line constitutes the Eastern boundary of this line. The new, or Michler line, is the Western boundary. Monroe's line ran between five and six rods West of the house. This land is assessed for taxes in Preston County, West Virginia, and has always been so assessed. His father is sick and not able to go about.

East of the Elder Spring tract lies a tract for 328 acres patented to Henry Deahl October 21st, 1837, on a survey dated April 22nd, 1834. This patent is "Monroe Exhibit No. 29," found on page 1809 of the Record, and North of it and also North of the Elder Spring tract is another patent to Henry Deahl for 367 acres, dated May 30th, 1834, on a survey dated January 25th, 1833 These patents call for each other, or rather the 328 acre patent calls for the 367 acres. Mr. Monroe explains in his testimony on pages 1673 to 1676, inclusive, the manner in which these Deahl patents are located, and other facts in connection with them and adjacent lands. His testimony is as follows:

> 477th Q. You spoke of the point G3 on the map as representing a corner of the Henry Deahl 367 acres. Have you the patent for that tract of land?
>
> A. I have. The same is filed in this cause, marked 'Monroe Ex. No. 28.'
>
> 478th Q. That tract is laid down on your map and designated?
>
> A. That tract is laid down in solid black lines on the map enclosing the words 'Henry Deal 367.'
>
> 479th Q. Why have you located it in the manner you have?
>
> A. This tract calls to adjoin James Irvin, and runs with two lines of the same, and it is my understanding that James Irvin at this time owned the northern portion of the Elder Spring tract, and the corner designated as G3 on the map is a common corner of the Elder Spring and this tract.
>
> Exception as to the understanding of the witness as to the ownership of the Elder Spring tract by James Irvin.
>
> 480th Q. Are there any lines in this Henry Deal

tract of 367 acres that correspond in course and distance and call with any of the lines of the Elder Spring tract?

A. There are two lines.

481st Q. Just give them?

A. The line east 100 poles to a stone pile, corner to said Irvin, thence south 7 west 80 poles to a stake, are common lines with the lines of the Elder Spring.

482nd Q. Are those the lines that converge at the point on your map marked red letter 'G3'?

A. They are.

483rd Q. Had you any other way of determining the location of that tract?

A. I had. At the end of 9987.5 poles on our line, I ran north 82¾ west 2.6 poles to a red oak pointed out to me by Marshall Friend as a corner of the Deal survey, and his corner, which is a part of the Deal survey and the Teets land. This point is designated on the map by the red letter 'G' and figure '4.'

484th Q. I notice on the map the word 'Henry Deal 328.' Does that indicate a tract of land. Is it intended to?

A. It is.

485th Q. What tract is that?

A. It indicates a tract of land of 328 acres surveyed for Henry Deal in Preston county, West Virginia, April 22nd, 1834.

486th Q. Will you give your reasons for locating that tract as you have?

A. In the surveyor's record of Preston county this tract of land is called for as adjoining the lands of said Deal on the southeast side, the lands of James Irvin, Henry Kelly and Raymonds' tract called Elder Spring survey, and beginning at a white oak corner of said Deal's former survey at the end of the fourth line.

(By Mr. Sincell):

487th Q. What is the date of the patent?

A. The date of the survey is April 22nd, 1834. I haven't the date of the patent.

Mr. Price: The date of the patent is 1837.

(By Mr. Price:)

488th Q. Will you file a certified copy of the patent to Henry Deal with your deposition?

A. I will, marked 'Monroe Ex. No. 29.'

489th Q. What lines then of that Henry Deal tract would be common with the Elder Spring tract?

A. The lines in this tract common with the Elder Spring tract are north five east 126 poles to a

chestnut, north 19 west 99 poles to a white oak, north six east, 93 poles to a stone pile.

490th Q. Will you read the corresponding lines in the Elder Spring tract?

A. I find upon examination that they do not correspond exactly with those lines, although this patent has the following calls: North 37 west 46 poles to a gum and large white oak, corner to Raymonds' land, and with his line north five east 126 poles to a chestnut, corner to Henry Kelly, and with his line north 19 west 99 poles to a white oak, corner to James Irwin, and with his line north six east 93 poles. Then east 6 poles to a stake and stone pile, corner to *aid* Deal's former survey, I was reading the wrong one.

491st Q. Had you given the white oak corner before?

A. No.

492nd Q. Just read then, from the Elder Spring.

A. The calls in the Elder Spring tract agreeing most nearly with these calls are as follows: Beginning in the center between two bounded trees, a white oak and black gum standing on a draught of Buffalo run, about 50 perches west from the main run, and about 200 yards from a spring that breaks out of a ridge that divide—the waters of Sandy creek and Buffalo run about eight or nine miles southwardly of Jacob Froman's mill, and running thence north 6 east 146 perches and north 20 west 80 perches north 7 east 173 perches.

493rd Q. What is the difference between the first line of the Elder Spring and the line you read running from the gum and white oak in the Deal 328 acres?

A. The first line of the Elder Spring calls for north six east 146 and the corresponding line in the *d*eal survey calls for north five east 126 poles.

494th Q. And the next line—what is the difference?

A. The next line in the Deal survey is north 19 west 99 poles, and the corresponding line in the Elder Spring is north 20 west 80 poles.

495th Q. The next?

A. The next line in the Deal survey is north 6 east 93 poles, and the corresponding line in the Elder Spring tract is north 7 east 173 perches.

496th Q. Did you find the lines which call for Deal's former survey to correspond with any of the lines of the Henry Deal 367 acre tract?

A. I find the call in this 328 acre tract east 6 poles to a stake and stone pile, corner to said Deal's former survey, and thence with the third line of the same east 126 poles to a chestnut and white oak, his corner to agree substantially with the following call in the 367 acre tract, which is east 124 points to a chestnut and white oak. The next call in the 328 acre tract is north 143 poles to the beginning, and the corresponding call in thr 367 acre tract is north 143 poles to a white oak. The description in the 328 acre tract calls to begin at a white oak, corner to said Deal's former survey.

497th Q. I notice on the map lying east of the Henry Deal tracts and adjoining Henry Deal 328 acres military lots 2981, 2980, 2983, 2985 and 2987, which last lot does not seem to exactly adjoin. How did you locate those military lots?

A. The lots 2985, 2989, 2952 and 2987 are laid down from a reference line run as follows: Beginning at the end of thirty one miles on our reference line, I ran south 17.4 poles to a stake south 40 east 49.6 poles to a stake south 55.50 east at 86.1 poles to a large chestnut pointed out by Marshall Friend as his corner.

498th Q. Designate that on the map?

A. Which is designated on the map by red letter and figure 'G5.' Extended this line to the end of 88.4 poles to a stake in Melville Friend's field, thence north 83¾ east 11.5 poles to a dead white oak pointed out by Marshall Friend as standing in military lot line of 2985, which is designated as red 'G6' on the map. From this point I ran north 3.45 east, at the end of 58 poles, I ran east 5.9 poles to a place pointed out by Mr. Friend as a corner of lot No. 2985. This point is designated on the map by red letter and figure 'G7'. That is the northwest corner of Friend's lot No. 2985. I do not know who lived there. At the end of 139.3 poles I ran north 77¼ west 14.4 to a white oak claimed by Marshall Friend as a corner of the orinigal Deal survey of 367 acres. This point is designated on the map by red letter and figure 'G8.' At the end of 227.5 poles I ran south 87 east 16.2 poles to the corner of lots 2989 and 2952, pointed out by Mr. Friend at that time owned by Isaac Morris. This point is indicated on the map by red letter and figure 'G9.'

This testimony shows that the Henry Deahl tract has several lines common with the Elder Spring tract, and, therefore, there cannot be any question as to its proper location with reference

to that tract. The houses upon these tracts are P. Welch's, just East of the Elder Spring tract, and Marshall Friend's East of the Northern portion of the Elder Spring tract, and Amanda Hull, just North of the Elder Spring tract.

The testimony of Melville G. Friend, found on pages 1479 to 1481 of the Record, gives the facts about the holding of this land between the Elder Spring and the Maryland line. He testifies that he owns 122 acres, which was conveyed to him in 1893, by his father, John H. Friend; that it extends over the old Maryland line, but does not reach the Michler line; part of it lies between the two lines. Witness had lived on it some years before he got the deed. The house is West of the old line about 65 rods. His land extends to within about 40 rods of the Michler line. After he got his deed in 1893, he had the land assessed in Garrett County, Maryland. Before that time his father, who owned the land, had it assessed in Preston County, West Virginia. He got it from the heirs of his father, C. W. Friend. C. W. Friend was the grandfather of the witness and had a Virginia title to this land. Afterwards, he says they got a Maryland title also. The way it came to be patented in both States is explained by him as follows:

This was taken up before the Michler line was run over here—taken up in Virginia. After they had run this line, you know, Maryland claimed it, and I suppose George Evans and John, they did take it up. I suppose they thought they could make a something by it, and did. They took it up in Maryland, and, rather than have any trouble, grand-father bought the Maryland title of John and George Evans; so that after that he had both a Maryland and a Virginia title, but he went on and paid taxes in Virginia on it just as he had done before. The original Virginia tract, of which it was a part, is the Banks survey. Witness's land adjoins the Military lots on the East, owned by William H. Friend, his brother. The Western line of these Military lots is ten or twelve rods East of the old Maryland line.

Marshall Friend, whose house is shown, as above stated, testifies on pages 1481 to 1483, as follows:

He is forty-eight years of age and owns 166 acres along the boundary line between Maryland and West Virginia. It was conveyed to him by the heirs of C. W. Friend. He has two tracts; 116 and 50 acres makes 166 acres. The 50 acres lies

right along the new Michler line, on the East side of it, and does not extend to the old Maryland line. This 50 acres was conveyed to him by Sarah Friend and others by deed dated February 7th, 1884, which is recorded in Garrett County, Maryland. This 50 acres is a part of the Elder Spring tract and is assessed for taxes in Garrett County, Maryland. Witness and Taylor Friend acquired title to the 116 acre tract from John James, and Taylor Friend afterwards conveyed his half to witness. The deed is produced, dated March 30th, 1872, recorded in the County Court Clerk's Office of Preston County, and is found on page 1541 of the Record. being "Exhibit No. 13," and the deed from Z. T. Friend and Marshall Friend is found on page 1542—"Exhibit No. 14." This 116 acre tract is assessed for taxes in Preston County, West Virginia, and has a dwelling house on it in which witness has resided for about twenty years. The old Maryland line is East of his residence about thirty or forty rods. The new Michler line is West, and this 116 acres extends to the Michler line, but no further. He states that it adjoins the Elder Spring tract this side of the Michler line, and it is 55 rods across it. This 116 acres is a part of the Deahl tract, a Virginia title. The Monroe line ran West of witness's house. The 116 acre tract extends Eastward beyond the old Maryland line, but not as far as the Military lots. The Military lots opposite this land are owned by William H. Friend and Roy Chisholm. The land of Melville Friend adjoins witness on the South and the heirs of George W. Teets on the North. He thinks George Teets made Jerry Teets a deed for it.

(Note: It will be seen that Marshall Friend's house is very near the line of the Banks' 8000 acres, and his tract of land is laid down there, extending nearly over to the Military lots, its Southeastern corner being designated on Monroe's map No. 1 by red letter and figure "G5". It is on the Southeastern portion of the Henry Deahl patent for 367 acres. The house of Amanda Hull is on the same tract just North of the Elder Spring tract.)

The other Virginia patent adjoining the Elder Spring is the patent to Samuel Boger for 250 acres, dated December 31st, 1849, on a survey dated March 1st, 1849. This patent is filed in this cause, marked "Monroe Exhibit No. 49," (Page 1843 of the Record.) Mr. Monroe testifies, on page 1692 of the Record, as to the location of this tract as follows:

"643rd Q. What tract of land have you indicated as lying on your map, west of the Elder Spring 411 acres?

A. A tract of land patented to Samuel Boger for 50 acres surveyed March 1st, 1849, and patented the ——— day of ——— 1849.

644th Q. Will you file a copy of that patent with your deposition?

A. I will, marked 'Monroe, Ex. No. 49.'

645th Q. Why do you lay down that patent west of and adjoining the Elder Spring tract.

A. The eastern lines of the Samuel Boger 250 acre tract conform practically to the western lines of the Elder Spring tract. The lines which are practically common with the Elder Spring tract are as follows: North 11 east 147 poles, north 41 west poles, north 7 west 30 poles, north 39 east, 82 poles, north 20 poles, north 47 west 98 poles, north 31 west 40 poles, north 24 east 80 poles, north 80 east 60 poles. The difference in bearings are accounted for by the magnetic variation allowed in running the lines."

On cross-examination (page 1750 of the Record), he testifies as follows:

353rd Q. Did you locate the Samuel Boger 250 acre tract on the ground?

A. I did not.

Plaintiff moves to strike the defendant's location of this tract from the map.

354th Q. There is no call in its description for the Elder Spring survey, is there?

A. It does not call specifically for the Elder Spring survey, but its eastern lines practically conform to the western lines of Elder Spring, and was thus laid down.

355th Q. In point of fact, it has no lines common with the Elder Spring tract, has it?

A. They do not exactly agree—practically so.

356th Q. Is it not a fact that you have located this tract upon your map, and made its lines conform to those of the Elder Spring tract?

A. I have. The difference in the lines is a matter of bearing, as recited in the Boger survey, where a certain allowance is made for a variation intended doubtless to conform to the Elder Spring line."

The State of Maryland has offered evidence showing that this Elder Spring tract was granted by the State of Maryland to Francis Deakins, assignee of William Deakins; that it was de-

vised by the will of Francis Deakins, to his nephew, John Hoye. (Record, page 725.) The will is dated September 24th, 1804. John Hoye and wife, by deed dated September 1st, 1834, conveyed this tract to William W. Hoye. (Brown Exhibit No. 30, page 729.) And William W. Hoye, by deed dated January 14th, 1833, conveyed part of the Elder Spring tract to Daniel Raymond. The part conveyed contains 111 acres, and seems to be the Southern end of the tract. It seems to have been sold under an execution against Daniel Raymond and purchased by Ralph Thayer and conveyed to him by the sheriff of Allegany County, Maryland, by deed dated April 20th, 1846. (Brown Exhibit 32, page 734 of the Record.) Afterwards it was sold under an execution against Thayer to Truman Fairall and conveyed to him by the Sheriff of Allegany County, Maryland, by deed dated January 5, 1864. (Exhibit Brown, No. 34, page 745.) Fairall and wife conveyed it to Samuel Forkner by deed dated November 5th, 1864. (Exhibit Brown, No. 35, page 747.) And Samuel Falkner conveyed it to Mary J. Falkner by deed dated March 10th, 1894. (Brown Exhibit 36, page 748.) These deeds only convey the 111 acres off of the lower end. They all seem to have been recorded in Allegany and Garrett Counties, Maryland, and the proceedings under which the sheriff's deeds were made were in Allegany County. The testimony of Samuel Falkner was taken by the State of Maryland and is found on page 1149. He testifies that he pointed out the beginning of the Elder Spring tract to Mr. Brown, being a black gum tree and a white oak stump, and that he owns the South end of the tract; bought it in 1864, and pays his taxes in Maryland, and that the State of West Virginia has never attempted to collect taxes from this land, as his title is on record in Maryland; that from twenty-five to thirty-five acres of his land lies west of the Michler line. The State of Maryland has also offered a number of deeds, being Exhibit Brown Nos. 37 to 52, inclusive, (Pages 749 to 787 of the Record), purporting to be conveyances of other portions of the Elder Spring tract; all of which deeds are recorded in Allegany and Garrett Counties, Maryland. It seems to have been understood by some of the people that as this Elder Spring was a Maryland title it was necessary to record their deeds in Maryland, but there is no evidence of any kind that the State of Maryland ever exercised any jurisdiction over this land. The

land all surrounding this tract are held under Virginia titles, and taxes paid and jurisdiction recognized in Virginia and West Virginia, whilst in one instance a man owning these adjoining lands, owned a portion of the Elder Spring tract and had his deeds recorded as to it on the Maryland side.

Cherry Hill.

The only other tract located by Mr. Brown on his map, granted by the State of Maryland and extending beyond the Michler line is the tract called Cherry Hill, lying North of the Elder Spring tract. All that part of Cherry Hill, which lies West of the old Maryland line, as claimed along there, was patented to Jesse Spurgin by patent dated May 8th, 1837, surveyed March 5th, 1836, containing 240 acres, leaving 144 acres of the original Cherry Hill East of the old line, and this was afterwards taken up by the same Jesse Spurgin under a Maryland patent called "Whipperwill," dated July 19th, 1842, surveyed May 7th, 1835. The Southwestern portion of the Cherry Hill tract is covered by the Henry Deahl patent for 367 acres, dated May 30th, 1834, heretofore mentioned in connection with the Elder Spring tract. The Cherry Hill patent is found on page 788, "Brown Exhibit No. 53." It was granted to William Deakins, assignee of Brooke Beall. The only evidence offered by the State of Maryland as to this Cherry Hill tract outside of the patent is a deed from William Deakins to Roger Perry, dated March 30th, 1798, conveying this tract, and a deed dated May 9th, 1822, from the sheriff of Allegany County to John King, conveying, among other things, all the right, title and estate of Roger Perry in this Cherry Hill tract. There is no evidence that any one has attempted to claim this land under the Cherry Hill patent, so far as it lies East of the old line, since 1822. The fact is that the same man, Jesse Spurgin, in 1835, May 7th, had that portion of it, lying East of the old State line, surveyed out under a Maryland warrant and obtained a patent for it in Maryland under the name of "Whipperwill", July 19th, 1842, (Monroe, Exhibit 30, page 1810). The language of the description in this patent is as follows:

> "The State of Maryland, doth therefore, hereby Grant unto him the said Jesse Spurgin the said tract or parcel of land called 'Whipperwill', lying in Allegany County aforesaid.
>
> Beginning at a bounded Spanish Oak Tree *stand-*

ing on the line said to divide the State of Maryland from the State of Virginia and about one half mile, Westward of James James's Dwelling House, and running thence North sixty-four degrees East one hundred and thirty-two perches, South forty-two degrees East one hundred and fifty-eight perches. South twenty degrees West sixty-four perches. to two White Oak Trees marked with two notches each, North eighty-seven degrees West two hundred and three perches, to the *aforesaid line, which is said to divide the State of Maryland from the State of Virginia*, then by a straight line to the beginning.

Containing One hundred and seventy-seven acres, according to the Certificate of Survey thereof, taken and returned into the Western Shore Land office bearing date the seventh day of May, Eighteen hundred and thirty-five."

And on the 5th day of March, 1836, he had that portion of the Cherry Hill lying in Virginia, West of the old line, surveyed and afterwards obtained a patent from the Commonwealth of Virginia, dated October 21st, 1837, (Monroe Exhibit 31, page 1811.) The description in this patent is as follows:

"A certain tract or parcel of land, containing two hundred and forty acres situate in Preston County on the waters of Buffalo Run a branch of Yohagannia River including an improvement made by James Pinear & transferred by him to Milan Brunehill who transferred the same to said Jesse Spurgeon bounded as follows. Beginning at a chestnut 8 poles North of *the beginning corner to said Spurgeon's Maryland Whipperwill survey* & running thence S. 204 poles to a stone pile thence S. 77 W. 84 poles to a chestnut oak corner to Henry Deal's 1st survey also the 2nd corner to the survey made for Riner thence N. 50 W. 156 poles to a chestnut near the head of a drain corner to said Deal corner to David Sickles, thence with two of Sickles' lines N. 2 E. 70 poles to a chestnut thence N. 52 W. 68 poles to a white oak then N. 62 E. 19 poles to a Spanish oak corner to Rebecca Ringer & with her line N. 33 E. 30 poles to a chestnut oak thence S. 63 E. 109 poles to a stone pile thence N. 66 E. 68 poles to a white oak thence S. 78 E. 58 poles to the beginning with its appurtenances."

These lands have been held under these patents respectively

ever since their dates. Mr. Monroe has located on his map No. 1 the house of Joshua Fike and the tracts held by Teets and Sylvanus Fike. The testimony of certain witnesses taken by the State of West Virginia in this cause shows how these lands are now held.

Mrs. Sarah Anne Teets testified in 1896, (Page 1471 of the Record), in substance, as follows:

That she is sixty-nine years old; the widow of George W. Teets; that her husband owned a tract of land between the old Maryland line and the Michler line. It was conveyed to him by Andrew Teets and wife by deed dated June 26th, 1869, page 1538, and contains 82 acres. It is designated on Monroe's Map by the words "Teets 82". The deed is recorded in Preston County, West Virginia. They lived on this land from the time they were married, which was before the War. They had a son in the army. He was eighteen when he went in the army. *The old Maryland line is East of her house a little piece, not far.* There is a fence that has always been there ever since they owned it, and before. George W. Teets was a son of Andrew Teets, the brother of Lewis Teets. Andrew Teets owned the land before he deeded it to her husband. Julius K. Monroe's line, run in 1894, was West of her house, The house stands between the old Maryland line and Monroe's line. The new Maryland line, run just before the War, is just West of her house. This 82 acres has been assessed in Preston County, West Virginia, and her husband voted there during his life time. Her husband, George W. Teets, also owned a piece of land containing 31½ acres, which was conveyed to him by William McGee and wife by deed dated March 6th, 1876, recorded in Preston County, in Deed Book 42, page 223. It is filed as Exhibit No. 11, found on page 1539 of the Record. It is designated on the map by the words "Teets 31½", lying South of the Cherry Hill tract. This 31½ acres has been assessed for taxes in Preston County, West Virginia, and the taxes have been paid there. Neither the 82 acres nor the 31½ acres have ever been assessed for taxes in Maryland.

Her son, William A. Teets is examined (Record, page 1473), and testifies in substance as follows:

He is a son of George W. Teets and Sarah Anne Teets; thirty-nine years old, was born on the place where his testimony was taken and has always lived there. *The line about two or three hundred yards East of their house has always been recognized*

as the boundary line between the State of Maryland and the State of West Virginia, and claimed by them as the boundary line. There is a fence on the line and has been ever since witness has known anything about it. The Monroe line was run about a couple of hundred yards West of the house. The new Maryland line, that is the Michler line, is West of the Monroe line. His father built the house on this land. His father and brothers, while they lived on this land, voted in West Virginia, Preston County. The land has been assessed for taxes in that County and the taxes paid there. He testifies that his grandfather, Andrew Teets, owned about 231 acres in a body at that place, which he got from old Jess Spurgin,—dead long ago. He conveyed part of it to Jerry Hayes, who conveyed it to Lininger—Samuel Lininger, who conveyed it to Alex Thomas, who conveyed it to John Taylor, who conveyed it to Joshua and Sylvanus Fike. They are the present owners of it. It lies Northwest of the land on which witness and his mother live.

(Note: This land is marked on the map "Sylvanus Fike 48"; "Joshua Fike 53", and covers part of this Cherry Hill original tract.)

John Taylor testifies, (Page 1484) in substance as follows:

He is sixty-eight years old; resides in Preston County, not over 200 yards from the new Maryland and Virginia boundary line and has lived in the neighborhood forty years, and married in that neighborhood—maried a daughter of Andrew Teets. She is now dead. Andrew Teets lived not three quarters of a mile from witness' house. He used to own the property which witness afterwards owned, where the Fikes now live. Witness owned 101 acres of this Andrew Teets property adjoining the old Maryland line. George W. Teets got a part of the property, and witness got a part and David Evans got 50 acres. *The part that witness owned adjoined the old Maryland line. There is a house on it. The house is between one-quarter and one-half a mile from the old Maryland line.* Pretty much all of the property lies between the old and the new Maryland line. It was all assessed in West Virginia for taxes; never paid any taxes in Maryland. Andrew Teets considered himself a citizen of Virginia and always voted there. He lived on that piece of land between what is now the two lines. The new line has never been recognized by the people in this neighborhood as the boundary line between the two States. *They have always held up to the*

old line; and the people owning land West of the old line have paid taxes always in West Virginia. The authorities of Maryland never exercised any jurisdiction over that territory in there. They never worked the roads. The West Virginia authorities worked it up to the old line. They worked it the Fall before witness' deposition was taken. Alex Thomas worked it right there where he lives. The corner is the other side of the road.

Sylvanus Fike testifies, (Page 1486) that he owns 48 *acres of land between the old and the new Maryland lines,* which he bought from John Taylor; has owned it about three years. He produced a deed from John Taylor and wife to him, dated March 25th, 1893, recorded in Preston County, filed as "Exhibit No. 15" (Page 1542.) Witness also produced a deed from Jesse Spurgin and wife to Andrew Teets, dated April 27th, 1855, and recorded in Preston County. It is Exhibit No. 16 (Page 1543). He also produced the deeds from Andrew Teets and wife to Jeremiah Hayes, dated January 24th, 1874; deed from Jeremiah Hayes to Rebecca Linenger, dated October 26th, 1878; deed from Samuel Linenger and Rebecca to William Hayes, dated August 5, 1880; deed from William Hayes and wife to Alexander Thomas, dated September 24th, 1880; deed from Alexander Thomas and wife to John Taylor, dated March 4th, 1882; all recorded in Preston County Clerk's office, West Virginia. Witness' house is not on this 48 acres, but near the line. His barn and granary are built on the 48 acres. The barn was built about fifteen years ago by John Taylor. Joshua Fike owns the adjoining piece, containing 53 acres; bought it from John Taylor. Witness' land does not go as far East as the old Maryland line. There is a strip between him and the old Maryland line owned by Lenius Dietrich. The distance between witness' Eastern line and the old Maryland line is something like 20 rods. The Michler line runs through his brother's, Joshua Fike, land, probably. The Monroe line is East of Witness's barn. The house and barn lie between the Monroe line and the Michler line. This 48 acres is assessed in West Virginia and the taxes have been always paid there. Witness has always voted there. The land is what is called part of the Spurgin land. Joshua Fike lives in another part of the same house with witness. He votes and pays taxes in Preston County, West Virginia. George W. Teets' heirs own the land South of his on the West Virginia side. George Evans owns the land along the line North of him. His land runs to the old line. The house,

in which witness lives, was built by Alex Thomas about eighteen years before witness' deposition was taken. Witness also produced the deed from John Taylor to Joshua Fike dated April 8th, 1891, (Exhibit No. 17, page 1545.)

George Taylor testifies (Page 1489) in substance, as follows:

He lives on George Evans' tract, containing close to 200 acres, as a tenant; property joins the old Maryland line. *It goes to the line.* The new Maryland line is West of the house on this tract, about 400 yards. The house is about one-quarter of a mile from the old Maryland line. The old line is East of the house. Monroe's line is East of the house about 100 yards. The dwelling house in which he lives has been built twelve or fourteen years. The land is assessed in Preston County, and witness and the others who have lived on this land have claimed their citizenship and voted in Preston County, *and the old line has always been recognized by the people in that neighborhood as the State boundary line between Maryland and Virginia.* This land does not extend quite as far as the Michler line. Witness is not sure about it, one corner may. The bulk of the land lies between the Michler line and the old Maryland line. Joseph Guthrie owns the land on the North along the Maryland line on the West Virginia side, and William Fearer also; Fearer goes down to the old line and Guthrie probably does not. Sylvanus Fike owns the land along the old line South of witness.

This evidence clearly proves that the Cherry Hill tract, so far as it lies West of the old Maryland line, has been taken up and held under the Virginia patent to Jesse Spurgin and Henry Deahl and has been claimed and occupied and possessed by persons residing on it under these titles, paying taxes and voting and exercising other rights of citizenship in Preston County, West Virginia. *All the old Maryland patents covered and held by Virginia grants.*

We think it is demonstrated, therefore, by the testimony in this cause, that all of the tracts of land, which were patented by Maryland, extending beyond the Michler line, all of them on surveys made as far back as 1774, are covered by Virginia patents, and that with the exception of a portion of the Elder Spring tract, they have been occupied by persons claiming under the Virginia and not the Maryland title. The evidence further shows that the old Maryland line East of the Michler line has always been recognized as the State line, even by the persons claiming the

Elder Spring title; that the jurisdiction of the State of West Virginia extended in every way to this old line. Prior to the running of the Michler line no other line was recognized as dividing the two States, except the old Maryland or Deakins line. The anomaly was presented of a portion of a piece of land containing 411 acres, lying considerably within the territory of Virginia and West Virginia, held under an old title granted by Maryland, no one ever having taken the trouble to patent the land in Virginia. In fact, the patent, as we have seen, was gotten by Francis Deakins, who was the owner of adjacent Virginia patents extending further Eastward. He seems to have been content with his Maryland title, but recognized that after 1774, the State of Virginia, not Maryland, had the right to grant these lands, and he took up the adjacent lands, extending farther East to the line run in 1789 under the Virginia patents. We submit, therefore, that the jurisdiction and control of the State of Virginia and West Virginia over all this territory between the Michler line and the Brown line, which we have now under discussion, must be regarded as fully and completely established from the earliest time.

TERRITORY BETWEEN THE MICHLER LINE AND THE OLD, OR DEAKINS LINE.

The remaining question to be considered is whether the old line, otherwise known as the Deakins line, shall be adopted and established as the boundary line between the States, or whether the line run by Lieutenant Michler in 1859 shall be adopted and established as such boundary line. This is really the question that we believe was intended to be presented and litigated by the bill as it was originally drawn by Governor White, then Attorney-General of Maryland. Since 1852, Maryland had recognized that the line must be run from the Fairfax Stone. The Deakins line had been run in 1789, and it was believed to be a due North line. It was never discovered that it was not a due North line until the line was run by Lieutenant Michler in 1859. His line was run by scientific, astronomical observations, and much more accurately than the old lines of nearly a century before and it was discovered that the old line varied from the due North course, striking the Pennsylvania line about three-quarters of a mile East of the point where the due North line would strike it, and the question to be decided in this case is whether Maryland is entitled to have this line run in a due North course, or whether West Virginia is

entitled to have the boundary line remain where it has been held to and recognized for more than a century.

We insist that under the decisions of this Court in similar cases, and under equitable principles, which apply to cases of this kind, the old line ought to be recognized and established in this case as the true boundary line, and that it is too late for the State of Maryland to ask that it be changed. All the considerations which have been advanced with reference to the territory between the North and South branches of the Potomac and the territory between the Michler and the Brown-Potomac lines apply with the same force to this territory between the old line and the Michler line. There is no more reason, so far as we can see, for disturbing this old line running from the Fairfax Stone, than there is for removing the beginning corner from Fairfax Stone to some other point. It is claimed, as we understand it, by counsel for the State of Maryland, that this old line should not be recognized because it is not a continuous straight line as now recognized and held to by the citizens, but has a number of angles and setoffs in it. It does not seem to us that this can have any weight. In the first place there is nothing to show that the line was to be a straight one, according to the charter; and, in the second place, the doctrine of laches and long continued exercise of jurisdiction and control is not affected by the shape of the territory held. It is a question of disturbing a status that has existed so long that it would be inequitable to disturb it, and it would be just as inequitable to disturb the possession held along a broken line as if it were along a straight line. In order that the Court may have the facts before it with reference to this old line, and the possession and exercise of jurisdiction up to it on behalf of Virginia and West Virginia, we will now proceed to give a statement of the evidence, though it will not be possible, we fear, to put it in a very brief space.

Old Maryland Line.

There is evidence in this cause to show that even before the running of the line by Francis Deakins in 1789, there was a line running due North from the Fairfax Stone, which was recognized as the boundary line between the two States. On this point we refer to the patent from the Commonwealth of Virginia to John Pettyjohn for 400 acres, dated April 20th, 1784, based upon a survey dated May 31st, 1781. This tract of land is shown on Monroe's

Map No. 2 just South of the Royal Charlotte. The land is described in the patent as follows:

> "A certain tract or parcel of land containing 400 acres by survey bearing date the 30th day of May, 1781, lying and being in the County of Monongalia on the headwaters of Yohogania River, *adjoining the Maryland line.* including his improvement made thereon in the year 1776, and bounded as followeth, to-wit: Beginning at a white oak in the Maryland line, and running thence N. 47½ degrees W. 78 poles to a cherry tree" then by several courses and distances "*to pointers in the Maryland line, and with said line* N. 226 p. to the beginning, with its appurtenances." (Record, page 466.)

Also patent to John Pettyjohn from the Commonwealth of Virginia, dated May 1st, 1784, for 350 acres, described as follows:

> "A certain tract or parcel of land containing 330 acres by survey bearing date the 20th day of April, 1782, lying and being in the County of Monongalia on the waters of the Yohogania adjoining his residence survey, and bounded as followeth, to wit:
> Beginning *at Pointers in the Maryland line and corner to his Residence Survey and Running with said Maryland line S 212 p. to a white oak &c*" then by courses and distances to the beginning.

This tract is also shown on Monroe'e Maps Nos. 1 and 2. (Record, page 466.) Also a patent to Zarah Osborne for 660 acres, dated June 24th, 1785, (Record, page 467) described as follows:

> "A certain tract or parcel of land containing 660 acres, by survey bearing date the 20th day of April, 1782, lying and being in the County of Monongalia on the waters of the Yohogania adjoining the lands of John Petty John and bounded as followeth to wit: *Beginning at Pointers in the Maryland Line, corner to John Petty John and Running with the Maryland Line due S. 280 p.* to a maple, W 30 p to Pointers, &c." by courses and distances to the beginning.

It is clearly indicated by these surveys that a line had been run due North from the Fairfax Stone prior to the running of the Deakins line and these surveys were located on and with reference to that line and just West of it, extending along it for an aggregate distance of 718 poles. The Southern point of these

lands on this line is about five miles from the Fairfax Stone and the Northern end is more than seven miles from said Stone, so that this line must have been run prior to that time a long distance and it clearly appears that at this time the surveyors of the State of Virginia and the Land Office and State officials recognized this as the State boundary line.

Running of the Deakins Line.

In the year 1781 the Maryland General Asembly of Maryland passed an act (Record, page 1307), entitled "An Act to Appropriate Certain Lands to the use of the Officers and Soldiers of this State and for the Sale of Vacant Lands". By this act it is enacted:

> "That *all the lands* within this State, in Washington County, Westward of Fort Cumberland and for which located warrants have not issued or surveys been made under common warrants and are now *bona fide* the property of any subject of this or any of the United States and on which the money has been actually paid, shall be and are hereby appropriated to discharge the engagement of lands heretofore made to the officers and soldiers of this State and the residue to the use of the public as the General Assembly shall hereafter direct, and no grant shall issue on any survey made in virtue of such warrants before the order of the General Assembly." (Record, page 1307.)

It will be noted that this appropriates "*all of the lands*" owned by Maryland West of Fort Cumberland.

By resolution of the General-Assembly at the April session, 1787, the Governor was requested to appoint and employ some skillful person to lay out the manors and such parts of the reserves and vacant lands belonging to this State lying to the Westward of Fort Cumberland as he may think fit and capable of being settled and improved in lots of 50 acres each bounded by a fixed beginning and four lines only, etc. Under this resolution Francis Deakins was appointed by the Governor, and, on December 10th, 1787, he made his report that he had carefully surveyed 4165 lots of 50 acres each, lying and being in Washington County and State aforesaid, on the manors and confiscated lands to the Westward of Fort Cumberland, as will appear by a

general plat thereof and certificates numbered in rotation from 1 to 4165 in two books which he returned. (Record, page 366.) An exact copy of the map returned by him is filed in this cause as an Exhibit with the answer of the State of West Virginia, marked "Defendant's Exhibit H," duly certified by the Commissioner of the land office of Maryland. It is the third map between pages 362 and 363 of the printed Record. This map shows that the Western-most lots were laid off along a due North line running from the Fairfax Stone, which is designated on his map with these words: "Meridian line and the head of the North branch of Potomac River as fix by Lord Fairfax." And he gives the miles in figures along this line.

At the November session of the General-Assembly of Maryland, held in the year 1788, an act was passed, reciting the pledge that had been mad to the soldiers for bounty lands, and also reciting the act of 1781, appropriating "*all the lands within this State in Washington County, Westward of Fort Cumberland*, to discharge the engagement of lands heretofore made to the officers and soldiers of this State &c," reciting the appointment of Francis Deakins by the Governor and Council to lay out these lands in lots of 50 acres each, and that he has returned a general plot of the County Westward of Fort Cumberland, on which 4165 lots, of 50 acres each, are laid off. He first authorizes certain families, who had settled on 363 of these lots, to purchase them, and then 2575 lots are set aside for the soldiers. These lots were contained in the following limits, to-wit:

> "Beginning at the mouth of Savage River and running with the North branch of the Patowmack River to the head thereof, *then North with the present supposed boundary line of Maryland* until the intersection of an East line to be drawn from said boundary line with a North course from the mouth of Savage River, will include the number of lots aforesaid."

And then appropriates the remaining lots to be distributed by lottery amongst the officers and their representatives. These lots were contained within the followiny limits:

> "By extending the aforesaid North course from the mouth of Savage River until its intersection with an east line to be drawn *from the aforesaid supposed*

boundary line of Maryland, will include the necessary number, allowing to each officer, or his representative, four lots as aforesaid."

This Act states that the line to which Francis Deakins has laid out said lots is, in the opinion of the General Assembly, far within that which this State may rightfully claim as its Western boundary; and that at a time of more leisure the consideration of the Legislature ought to be drawn to the Western boundaries of this State, as objects of very great importance. This Act is found on page 874 of the Record "Exhibit Brown, No. 8." The language of this statute clearly indicates that the understanding at that time was that these lots had been laid out to a certain line, and the map returned showed that this was a due North line running from the Fairfax Stone. The State of West Virginia has filed with her answer, as Exhibit No. 1, a transcript of all the Military lots laid out by Francis Deakins along this Western line. It is found on page 366 of the Record and duly certified from the Commissioner of the Land Office. Mr. Brown has laid down a few of these Military lots upon his map. In each instance he has located them by first adopting a location for one of the old Maryland surveys called for in the description of the Military lots, and has then made the location of the Military lots conform to his location of the old tract of land. Whether his location of these old tracts is correct or not, it is impossible to tell. As has been mentioned before, these Maryland tracts call for but one natural object, that is the beginning point. The other lines are then simply run by course and distance, and if the beginning point cannot be definitely located there is no way to make a definite location of the tract. Owing to this condition there has been great confusion and litigation over the location of land titles in what is now Garrett County, Maryland. It appears from the map made by Mr. Monroe, and upon the testimony of the witnesses in the case that the location of these Military lots, as now recognized and held, so far as they are known and recognized, does not conform to a due North or a continuous straight line, but that a line drawn through the Western boundary of these lots, so far as they can be located, will constitute a broken line to some extent. It is clear, therefore, that either Francis Deakins did not run his line through as a continuous straight line, but made offsets in it because of these old surveys or because of the swamps and other natural obstructions in that country and failed to get back on to

his original line when he got beyond the obstructions; or else, that the surveyors, in after years, erroneously located these lots from what Deakins had located them, and that this grew out of their attempted location of these old obsolete surveys; but the descriptions of the lots, themselves, show that their Western line was a due North line in every case, and some of them show that this due North line was intended to be a line running from the Fairfax Stone. Going North from the Fairfax Stone, the first Military lot that was laid out was Lot 1101. It is described by Francis Deakins as follows:

> "Beginning at a bounded maple, *marked* 1100, *standing one mile North from a stone fixed by Lord Fairfax for the head of the North branch of Potomac River,* and running North 89½ perches, East 89½ perches, South 89½ perches, then by a straight line to the beginning, containing 50 acres."

The next is Lot No. 1102, which is described as follows:

> "Beginning at a bounded sugar tree, marked 1102, standing North 89½ perches from the beginning of Lot 1101, and running North 89½ perches East 89½ perches S 89½ perches, then by a straight line to the beginning, containing 50 acres."

By reference to Deakins map it will be seen that these two lots 1101 and 1102, are represented as adjoining the line just one mile from the Southern end of his meridian line running from the Fairfax Stone. Mr. Brown made no attempt to locate these lots, but they were located by Mr. Monroe on his map. Upon this point he reports (Record, page 1382), as follows:

> "Pursuant to these instructions, we began the survey at the 'Fairfax Stone' and ran a magnetic line from that point North (Variation 3 Degrees 40 Minutes) to Mason and Dixon's line, the Southern boundary line of the State of Pennsylvania, and took the following notes along said line:
>
> At 242 poles, center of the North branch of the Potomac River flowing East;
>
> At 250 poles strike hemlock and birch marked as center line trees on North and South sides;
>
> At 314.08 poles passed 6-10 pole West of a planted stone, marked 'B' '1101', with a much decayed trunk

of a maple tree lying from said stone. This point is believed to be the beginning corner of Military Lot No. 1101, as laid out by Francis Deakins in 1789, and also the point at which the 'first mile tree' of said Deakins line extending North from the 'Fairfax Stone' stood.

The description of said Military Lot No. 1101, as reported by Francis Deakins, begins at a bounded maple marked '1101' standing one mile North from the stone fixed by Lord Fairfax, for the head of the North branch of the Potomac River;

At 320 poles planted first mile stake;"

It will be seen, therefore, that Mr. Monroe found upon the ground 6-10 of a pole West of his line a stone marked "B" "1101" and a decayed trunk of a maple tree lying upon this stone. This stone and tree trunk weer not exactly one mile from the Fairfax Stone, it being nearly six poles short of the mile; but Mr. Monroe testifies that if the original Deakins line, run in 1789, was measured by surface measurement, the mile in question would doubtless be shorter than it is by his line when measured on the ground, as he measured horizontally, and this would probably account for the difference of six rods in the measurement. Mr. Monroe's testimony upon this point, found upon pages 1633 to 1637 is as follows:

"98th Q. Beginning at the Fairfax stone in running your reference line, did you cross the Potomas river at any point?

A. Yes, sir; at the end of two hundred and forty poles, or I believe at the end of two hundred and forty-two poles, to be exact.

99th Q. Get it accurate.

A. (Referring to memorandum). Two hundred and forty-two poles.

100th Q. After crossing the river, what evidence on the ground did you find of the existence of a previous line along there?

A. I found some line trees marked fore and aft, and also passed by a planted stone marked 'B 1101.'

101st Q. Where was that stone?

A. At three hundred and fourteen and eight-tenths, we passed six tenths poles west from that stone.

102nd Q. How is that point designated on your map No. 1?

A. Designated on the map by the red letter and figure 'A1.'

103rd Q. What distance is that stone from the Fairfax stone?

A. Three hundred and fourteen and eight-hundredths poles.

104th Q. How near is that to being one mile?

A. It lacks about six rods of a mile.

105th Q. Those measurements were made recently?

A. Yes, sir.

106th Q. If the original Deakins line in 1789 was measured by surface measurement, would there likely be some discrepancy between your line and that?

Exception to the question, by counsel for the State of Maryland, because it assumes that the Deakins line was run.

A. It would doubtless be shorter.

107th Q. I call your attention to this description of the Maryland Military Lot No 1101, as follows: 'Beginning at a bounded maple marked 1100 standing one mile north from stone fixed by Lord Fairfax for the head of North Branch of Potomac river, and running north eighty-nine and one-half perches east eighty-nine and one-half perches south eighty-nine and one-half perches, then by a straight line to the beginning, containing fifty acres,' and I will ask you whether at or near this stone which you have spoken of, you found any evidence of a maple tree?

A. We found the trunk of a maple tree lying from this stone.

108th Q. Could you tell whether it was marked or not?

A. No, sir; too much decayed.

109th Q. Was this stone and maple pointed out to you by any one as the corner of any tract or piece of land?

A. I do not recall that it was just at this time. I am not sure about that. I have no note of it. I had these papers, however, in my possession, looking for those points.

110th Q. What tract of land lies west of that point where this stone and maple were found?

A. A small tract of land taken up by John Hoye, I believe, seventy-two acres.

(By Mr. Sincell:)

111th Q. Did you locate that tract by actual survey?

A. I located the beginning corner of it.

Mr. Sincell: Evidence of the location of this tract is excepted to, unless it is shown that the witness located it on the ground by actual survey.

(By Mr. Price.)

112th Q. Look at the paper now handed you, purporting to be a copy of patent from the Commonwealth of Virginia to John Hoye, dated December 31st, 1844, and filed as Exhibit N. No. 12, with the answer of the defendant in this cause, and state whether you have laid down that patent on your map No. 1.

A. I have.

113th Q. How did you locate it?

A. I do not know as I understand your question.

114th Q. You laid it down on your map. How did you do it?

A. It is laid down by protraction.

115th Q. Why did you lay it down as you did on the map?

A. The description fitted the grant and adjoining tracts.

Exception to the answer, by counsel for the State of Maryland.

116th Q. If the stone and the maple which you have mentioned constituted the corner of Military Lot 1101 on the Deakins line, would the eastern boundary of that lot 1101 correspond with the Michler line at that point?

Exception to the question, by counsel for the State of Maryland, on the ground that it assumes that the location mentioned is the location of lot No. 1101, and there is no evidence of such location.

A. No, sir.

117th Q. Where is the Michler line with reference to that stone and maple?

A. West of the Stone and maple.

118th Q. How far?

A. Four rods perhaps.

119th Q. Have you ever seen the map prepared by Frances Deakins of the Military lots laid out by him under the authority of the State of Maryland west of Fort Cumberland in 1789?

A. I was shown a map in the Maryland land office by the commissioner of the office as the original Deakins map.

120th Q. Did you make a tracing of so much of that map as lies along the Maryland line?

A. I did.

121st Q. Look at the map now shown you marked 'Monroe Exhibit No. 1' and state what it is?

A. That is a tracing of that portion of the map adjoining the western boundary line of Maryland, as shown to me by the commissioner?

122nd Q. Is the tracing made by you?

A. Yes, sir.

123rd Q. I call your attention to said map, and ask you what is the number of the first of the Military lots going north from the Fairfax stone shown on that map.

A. 1101.

124th Q. What distance from the Fairfax stone?

A. One mile.

125th Q. Have you located that lot 1101 on your map No. 1?

A. Yes, sir.

126th Q. How does it correspond in location on your map with the location appearing on this tracing of the Deakins map?

A. It is located at the end of three hundred and fourteen poles on our line, instead of three hundred and twenty on his.

127th Q. Is there another lot appearing on the Deakins map just north of that?

A. There is.

128th Q. What is it?

A. 1102.

129th Q. And you have on your map a lot of the same number lying north of the lot 1101 also, have you.

A. Yes, sir.

130th Q. Now, in locating the Hoye seventy-two acres, where did you locate it with reference to the location of those military lots?

A. Just west of them and adjoining.

131st Q. Going north from the stone and maple trunk, what was the next evidence you encountered of an ancient line along there?

A. At five hundred and fifteen poles I passed one and eight-eight hundredths rods to the left of west of a very large and anciently marked hemlock tree.

Objected to by counsel for the State of Maryland, because the hemlock is not located on the plat.

132nd Q. How far is that above the stone marked 'B 1101'? How far north of that stone was this hemlock?

A. About two hundred poles north of it.

133rd Q. Will you please locate that hemlock upon the plat and designate it by a red letter?

A. It is marked red letter A. and figure 2.

134th Q. How was that hemlock marked?

A. Fore and aft.

135th Q. What do you mean by that?

A. North and south sides.

136th Q. Going on north, what was the next evidence you found of an ancient line.

A. At seven hundred and forty-four poles, I passed four tenths of a pole west of a large hemlock anciently marked fore and aft.

Excepted to because it is not located upon the plat.

137th Q. Will you please indicate on the map the point where that hemlock stood, and designate it by a letter.

A. That point is designated on the map by red letter A, figure 3.

138th Q. How was that hemlock marked?

A. Fore and aft, north and south side?

139th Q. Did the mark on this hemlock and the one last spoken about designated as red letter A2, appear to be ancient or recent?

A. Ancient.

140th Q. Did you come across any of the monuments planted on the Michler line in that locality?

A. At the end of nine hundred and nine and thirty five hundredths poles, we passed twelve and seven tenths poles east of a large stone monument on the summit of Backbone mountain, supposed to be placed by Lieutenant Michler—supposed to be on the Michler line.

141st Q. Why do you suppose it?

A. It is a larger and a better finished monument than usually marks property lines. There was no inscription on it.

142nd Q. Was it pointed out on the ground as the Michler monument?

A. I suppose it was, but I do not recall who pointed it out. It was recognized in that country.

143rd Q. In the survey made by Mr. Brown in this case, how was that monument treated?

A. As the Michler monument.

144th Q. Is it represented on Mr. Brown's map filed in this cause?

A. I think it is.

145th Q. Is it represented on that map?

A. It is represented on my map by a small square with the words 'monument No. 1' opposite it.

146th Q. How is it designated on the map of Mr. Brown.

A. I will have to get that map and see. (Witness examines map). This point is designated on the map made by Mr. Brown in this case by the words 'Backbone station', and the letters 'XB', and a small circle.

147th Q. Passing on north along the line run by you, what was the next point indicated on the ground?

A. At one thousand, one hundred and seven and two tenths, we passed one and four tenths poles west of a large chestnut oak marked as a corner, stone pile and pointers.

148th Q. Will you designate that point on the map, and mark it with a red letter?

A. This point is designated on map No. 1 by the figures '1107.2', and a red letter 'A' figure '4'.

149th Q. Have you made any survey of a tract of land adjacent to that large chestnut oak which you have just spoken?

A. Yes, sir.

150th Q. What tract?

A. A tract of land called the Wilson, Morris & Byrne tract, now owned by the Loar heirs."

Monroe's Line A Reference Line.

The line run by Mr. Monroe, which is shown on the maps, East of the Michler line, was run simply as a reference line and was not intended to indicate any boundary line as claimed by the State of West Virginia. See his report, (Record, page 1382) as follows

"We were instructed by the Attorney for the State of West Virginia to locate and retrace upon the ground, as far as possible, both the line run by Lieut. Michler in 1859 and also the old Maryland line known as the 'Old State Line' between Maryland and West Virginia, and sometimes spoken of as the 'Deakins Line'. The 'Deakins Line' he understood, had been run in 1789 by Frances Deakins, just prior to, or at the time he laid out what are known as the 'Military Lots' West of Ft. Cumberland, as bounty lands for the Revolutionary soldiers for the State of Maryland. We assumed that the magnetic variation of the needle between 1789 and 1894 would be about 3 Degrees 40 minutes West, and we thereupon undertook to run a reference line North with a variation of 3 Degrees 40 minutes. We were also instructed, by Attorney for the State of West Virginia, to note and locate upon

the ground the property lines along and adjacent to the lines aforesaid, both as held at present and also as originally granted by the State of Virginia, and in some cases, also to locate and run out grants made by the State of Maryland."

Also pages 1626 and 1627, as follows:

"25th Q. Were you in charge of the instrument and of the survey during the first surveying that was done in this cause on behalf of the State of West Virginia?

A. I was.

26th. Q. When did that survey begin?

A. The survey began on October 4th, 1894.

27th Q. Where did you begin?

A. At the Fairfax stone.

28th Q. What surveyor, if any, was present during that survey representing the State of Maryland?

A. Mr. John Harned was present representing the state of Maryland all the time.

29th Q. Speaking generally, what was the work done on that survey?

A We ran a reference line by the needle from the point known as the Fairfax stone northward to the Pennsylvania line, and during the running of the line took such references as we deemed necessary to locate land titles along the line, streams, roads, buildings, and we also ran reference lines to the different known points on the Michler line.

30th Q. Did you take reference to any other lines besides the Michler?

A. We took references to the line pointed out as the old state line wherever we could.

31st Q. What were your instructions and what was the purpose of doing the work which you have mentioned—the running of the reference line, etc.?

A. Our instructions from counsel represenitng the State of West Virginia—

Mr. Sinceil: Were those instructions in writing?

Mr. Price: No.

The Witness: Our instructions from counsel representing the State of West Virginia were to do such surveying as would be necessary to locate the land grants lying along and adjacent to the old state line, as it was termed, and any other information as to the settlements, and houses, roads, and streams, and to locate the Michler line, so that it could be laid down, as well as the land tracts, upon a map showing the relative positions in regard to these lines."

The original Deakins line, which Mr. Monroe was endeavoring to re-trace and locate, was undoubtedly run by a surveyor's compass, and Mr. Monroe testifies that in such a case the best and most proper instrument for re-tracing such a line is the surveyor's compass, and gives at length, in his testimony on pages 1628 to 1633, his reasons for using the compass rather than a transit, or other instrument:

"52nd Q. What, if any, reason did you have for using the surveyor's compass in this work rather than the transit?

53rd A. As I understood, the original lines and land grants had been run out with a needle instrument, and we concluded that they could be better traced and located with a similar instrument, and for that reason we adopted that kind.

54th Q. Is that your judgment that they could be better traced upon the ground by a compass than the transit?

A. Yes, sir, it is.

Exception by counsel for the State of Maryland to the question and answer.

55th Q. What is the instrument used in land surveying generally?

A. Generally a needle instrument, sometimes a telescope, and sometimes a plain compass.

56th Q. Isn't the transit a needle instrument

A. Yes, sir.

57th Q. Do you intend to dishtinguish the compass from the transit by calling the compass a needle instrument?

A. Yes, sir, because the compass is operated wholly by the needle, while the transit is sometimes used to foresight and backsight without reference to the needle.

58th Q. As between the transit and the compass which one of those two is used most frequently and ordinarily in land surveying?

A. The compass instrument.

59th Q. Why?

A. Because it is a more portable instrument, and usually the needle is a longer and better needle than there is on the transit.

60th Q. In using the compass, do you make long or short sights of the instrument generally?

A. Generally somewhat shorter than with a transit instrument—can get very long sights back—

61st Q. At each point where you set the instru-

ment how do you determine your course from that point?

A. By the needle alone.

62nd Q. By the needle alone?

A. Yes, sir.

63rd Q. When you are running with the transit as such, in what way do you determine your course from one point to another?

A. If you are running a magnetic line, you determine it by the needle alone?

64th Q. And if you are not running a magnetic line—just go on.

A. If a fore and back sight line, the line is produced by fore and back sights, regardless of the needle, only using the needle as a rough check.

64th Q. What do you mean by fore and back sights? Please explain.

A. The instrument is placed at some initial point, from which point a point is set in the line intended to be run ahead. The instrument is then taken forward, and carefully set over this point, and the back sight taken up on the initial point, the telescope reversed and the line produced in that manner, or the telescope is sighted to the initial point and an angle of one hundred and eighty degrees turned, on the limb of the instrument, which would produce a straight line ahead.

65th Q. Then having taken the back sight to the initial point how do you get forward?

A. As I stated, we take the back sight to the initial point, reverse the instrument, reverse the telescope, set another point forward, and then move to that point and continue.

66th Q. How do you determine that point forward, where it is to be?

A. By sighting to the initial point, revolving the telescope, and setting a point in the line ahead in the line of sight of the instrument.

67th Q. So as to make the three points in the same line, is that right?

A. Yes, sir.

68th Q. Then you go forward from point to point in that way, do you?

A. Yes, sir.

69th Q. And your effort all the time is to make each subsequent point in an exact line with the points through which you have already passed?

A. That is the object; yes, sir.

70th Q. In doing that, do you run by the needle?

A. No, sir

71st Q. If then you at any point in that line from the initial point to the first point, or from any subsequent point to another, should get the wrong course, would you ever be able to correct that in the subsequent running of that line?

A. Not without rerunning the line.

72nd Q. In other words, then, as I understand it, a transit line is such as is run without reference to the magnetic meridian? Is that right?

A. Usually. Sometimes you start on the magnetic course and continue by angles.

73rd Q. But you do not run by the pointing the magnetic needle?

A. No, sir.

Q. So that if a line were originally run according to the pointing of the magnetic needle, and it were a line of considerable length, would you expect to be able to retrace it accurately by running it with the transit without the needle?

A. No, sir.

74th Q. How long has the transit instrument been in use in this country in land surveying, so far as you know?

A. It has been in use more or less ever since it was invented, I believe, in 1827. It is not commonly used in land surveying, except where the land is very valuable, and there they use it by angles and not by the needle.

75th Q. Do I understand you to say you believe it was invented in 1827?

A. Yes, sir.

76th Q. So that in 1789 and prior to that time, a line run northward from the Fairfax stone would not have been run by a transit instrument?

A. Not at all likely.

Exception to the question by counsel for the State of Maryland.

77th Q. What is the difference between running a line by the surveyor's compass on the ground, and running it by astronomical observations upon the North star?

A. The line on the ground run by a compass instrument is governed wholly by the magnetic needle, while an astronomical line is run by the star or the sun, and is a very difficult and expensive operation, not available for ordinary land work at all.

78th Q. Take a line thirty-six miles long and run it due north with a surveyor's compass, and then begin at the same point and run a due north line according to the north star and by astronomical observations, would the two lines conform to each other?

A. No, sir.

79th Q. Why not?

A Because of what is termed the declination of the needle. In the latitude of the Fairfax stone and the Pennsylvania line, the magnetic needle changes, and the farther north you go the more it changes, the magnetic needle varying rather more to the eastward the farther north you go.

80th Q. Is that perceptible in a thirty six mile line?

A. Yes, sir, it would be. It would make it forty or forty five minutes,—would change it that much, I believe we determined, on out line.

Mr. Brown: I believe it was forty-three.

The witness: Forty-three.

81st Q. Are there other causes that would prevent those lines from conforming to each other?

A. Well, there are local causes that might prevent them. Of course, the needle is not so accurate as the other.

82nd Q. What effect would local causes have?

A. The needle changes sometimes from day to day quite a good deal, one way and another. Very seldom as much as fifteen minutes in a day. I have known that much on one or two occasions, swings a little east of the line you are running in the forepart of the day, and back a little ways in the after part of the day, what is called the diurnal change of the needle—more in hot weather than cold.

83rd Q. If you keep on running from day to day thirty-six miles, will these diurnal variations offset one another, get back to the same line?

A. Practically so I should judge.

84th Q. Those variations are always one way are they?

A. They are always one way in the fore part of the day, and the other in the after part, so that running all day long we consider in ordinary surveying that it balances up, and we do not take account of it.

85th Q. Then there are other causes that bring about a variation in the needle, are there not?

A. Yes, sir Electric storms disturb the needle

considerably at times. That, however, does not usually last but a short time.

86th Q. What is the difference, if any, between the variation of the needle, and the declination of the needle?

A. The variation of the needle means the variation between the point of the magnetic needle at different times. The declination of the needle means angle formed by the needle and the true meridian, the true north and south line.

87th Q. What is necessary in order to run a true meridian by astronomical observation, speaking generally?

A. Generally speaking, you have to be supplied with very expensive instruments, and the observations on Polaris usually, being the closest star to the north pole, is a very refined process. The equipment and the observations are usually handled by experienced people.

88th Q. When do those observations have to be made, and how often? How much of it?

A. Dr. Bauer spent a number of days at each of his stations on that line taking observations on Polaris, and other circumpolar stars, as well as observations on the sun for latitude, etc.

89th Q. How long was he locating the true meridian line on the survey in this cause?

A. He retraced the Michler line, reran that line, and ran another line about a mile and a quarter west of that line, and about thirty-six miles long, and it occupied him, I should judge, about three months, or four.

90th Q. Then what would you say as to the practicability of running property lines and boundary lines, which must be frequently adverted to and retraced on the ground, by the method of astronomical observations?

A. I should say in all ordinary cases, it would be very impracticable.

91st Q. Suppose a line thirty-six miles long was located by astronomical observations, and toward the middle of that line in course of years the monuments which were placed there should be destroyed or obliterated, and a land owner owning land extending several miles along that line in that locality desired to find out his property lines, how would he do it?

Excepted to by counsel for the State of Maryland on the ground of irrelevancy.

A. It would be a very difficult thing to do, too expensive in an ordinary case for a property owner to attempt it by astronomy.

92nd Q. Then if he could not find the monuments on the ground at each end or at the opposite direction from his property, he would have to resort to the method which you have described in order to get accurately his property lines, would he not?

A. That would define his lines as accurately as they are ordinarily defined on the ground.

93rd Q. I mean, he would have to take the astronomical observations as Dr. Bauer did if he wanted to find that line again, wouldn't he?

A. Yes, sir.

94th Q. If the monuments were not there? The ordinary compass surveying for a long distance would not as I understand it retrace that astronomical line?

A. No, sir.

95th Q. Is the ordinary civil engineer and surveyor competent to run the true meridian by this kind of astronomical observation

A. Not ordinarily.

96th Q. What class of men are required for that work?

A. Usually the highest class of engineers, especially equipped for that kind of work. Few civil engineers know anything about astronomical observations.

97th Q. Have they usually the instrument needed to carry on that work?

A. No, sir, not the refined astronomical work."

A great deal of time and pains has been taken by Mr. Brown and counsel for the State of Maryland to show that a straight line cannot be run upon the ground for a long distance with the ordinary surveyor's compass, and Mr. Monroe was cross-examined at considerable length upon this question and a great deal of time and pains was taken to show that this reference line run by Mr. Monroe is not a straight line upon the ground. It seems to us that this was time and labor wasted, because Mr. Monroe agrees that this is true, speaking astronomically and according to true scientific meridians. But this was not the class of work that Mr. Monroe was doing. He was finding the old line by locating natural and artificial objects upon the ground, the theory of counsel for West Virginia being that if this line can be located definitely on the ground and it can be shown that it has been

recognized ever since it was run as the boundary line between the States, the Court will adopt it as such and not disturb it simply because it does not conform to the true magnetic meridian.

Present Location of Military Lots.

It will be noted that the next lots, going North along this meridian line, are lots 316, 317 and 318, adjoining and North of the Royal Charlotte. This lot No. 316 begins at 2967.6 poles, or more than nine miles North of the Fairfax Stone, so that there is a space of about eight miles between these lots. The next lots further North are 345, 342, 343 and 344, which lie South of the tract called Kindness, twelve to fourteen miles North of Fairfax Stone; and the next lots are 1237, 1238, 1239, 1241, 1243 and 1245 Northwest of the tract called Thomas & Anne. These are from seventeen to nineteen miles North of the Fairfax Stone. These lots so far mentioned conform pretty nearly to a continuous line from the Fairfax Stone, as shown on Mr. Monroe's map, and as at present located and claimed by the inhabitants. The next lots that adjoin the line going North 1282, 1284, 1286, 1288, 1290, 1292, 1294, 1293, 1298, 1400 and 1402. As located by Mr. Monroe, these last mentioned lots lie from twenty-three to nearly twenty-five miles from the Fairfax Stone. They are in what is known as the Pine Swamp, and the testimony shows that this is almost an impenetrable wilderness. These lots are located by Mr. Monroe on a line considerably to the East of the lots hereofore mentioned, although according to Deakins' map they should be on the same line. These last mentioned lots run up to and adjoin the tract called Diadem; and North of that tract, along this line, are Military lots Nos. 1463, 1462, 1461 and 1460. 1463 and 1462 are located by Mr. Brown entirely from his location of the tract called Diadem, and all these tracts are located by Mr. Monroe as near as he could from the claims of the present owners. These lots, lying North of the Diadem, are located by Mr. Monroe on a line a little East of the line upon which the lots are located South of the Diadem. Whether the present location of the Diadem is the same as it was understood to be by Francis Deakins, is very doubtful. It seems probable that he located the Diadem somewhat further West than it is located by the present surveyors. Certainly he intended his lots, adjoining the Diadem, to be on the same line mentioned South of them. The next lots along the line, which are located by Mr.

Monroe, going North, are lots 2981, 2980, 2983, 2985, 2987, 2989 and 2952, lying South of the Cherry Hill tract, and 2954, 2957, 2958 lying North of that tract and between it and the Granary. These lots, with the other Military lots, so far as located by Mr. Monroe, are on a line still further East than the lots located adjoining the Diadem. The description of lot No. 2952 calls to begin at the end of 34 perches on the first line of Cherry Hill, granted to William Deakins. And lot No. 2954 calls to begin at the end of 50 perches on the fifth line of Cherry Hill. The Deakins map shows that his understanding was that those points were in a due north line from the Fairfax Stone. This old Cherry Hill tract is located now by very uncertain testimony, and from its location these Military lots are laid down.

Uncertainty of Location of Old Maryland Grants.

We have called the Court's attention to the location of these Military lots as showing the uncertainity of the location of the old tracts of land, and as bearing out the suggestion which we made that there has been great uncertainty and confusion in the location of these Maryland titles. We do not make the claim in this case that the present location of the Military lots indicates the State line as recognized and claimed by the inhabitants since 1789. The evidence shows where this line is, and that it is the Eastern boundary line of the grants made by the State of Virginia after and before this Deakins line was run in 1789; it being clearly shown in the testimony that it has been always recognized that along the Northern end of this meridian line there is a space of several rods between the old Maryland and Virginia line and the Western line of the Military lots; this space having been patented in Maryland by patents, whose lines conform to the old line on one side and to the Western line of the Military lots on the other. This state of things can only be accounted for by the supposition that the Virginia surveyors, one of whom in many instances, was this same Francis Deakins, knew where the due North line had been run by him, and the Virginia grants were located with reference to it, whilst subsequent surveyors, in attempting to locate the Military lots by tying them on to the old Maryland grants, mistook the proper location and failed to conform to this due North line.

Location of the Old Maryland or Deakins Line.

There is comparatively little difficulty in locating the old Maryland, or Deakins line, as it has been held to and recognized by the citizens on both sides from the earliest time. In the first place, Mr. Brown, the surveyor, for Maryland, has located a number of points in this old line on his map, and his locations conform to locations made by Mr. Monroe, as shown on his map. That portion of Mr. Brown's report relating to this matter is found on pages 948 to 950 of the printed Record. It is as follows:

> "I further certify and return, that by direction of Counsel for the State of Maryland, I have located by actual survey, and laid down upon the plats for illustration, the following points in a supposed 'old line', according to the testimony of residents at different points along the same.
>
> 1st. A white oak tree, pointed out to me by Lloyd Dawson, a witness produced upon the ground, on behalf of the State of Maryland, as a point in 'the old line.' This tree was blocked, and the marks in the concentric rings were found to be not much over forty years.
>
> This point is by latitude, 35697 feet North, and by departure, 6121.1 feet East of 'Potomac Spring', and the perpendicular distance from the 'Bauer-Michler Meridian' being 148.3 feet. This point is designated upon the plats by the *black letters W. C.*
>
> 2nd. A thorn tree stump, pointed out to me by Francis Martin, a witness produced upon the ground on behalf of the State of Maryland, as a point in 'the old line', which stump stands on the East side of the road leading from Oakland to Aurora.
>
> This point is by latitude, 38161.4 feet North, and by departure, 6137.9 feet East of 'Potomac Spring', and the perpendicular distance East from the 'Bauer-Michler Meridian' is 165.6 feet. This point is designated upon the plats by the *black letters W. D.*
>
> 3rd. A fence, pointed out to me by Peter F. Nine, a witness produced upon the ground on behalf of the State of Maryland, as a point in 'the old line.' This point is by latitude, 42276 feet North, and by departure, 6190.2 feet East of 'Potomac Spring', the perpendicular distance East of the 'Bauer-Michler Meridian', being 219 feet.
>
> Said fence is shown upon the plats and designated by the *black letters, W. E.*

4th. A white oak tree, pointed out to me by Julius K. Monroe, standing on Stahl's hill, and shown upon the plats at *black letters, W. F.*

This point is by latitude, 44420 feet North, and by departure, 6230.5 feet East of 'Potomac Spring', the perpendicular distance East of the 'Bauer-Michler Meridian', being 259.7 feet.

5th. A fence, pointed out to me by J. W. Jones, a witness produced upon the ground on behalf of the State of Maryland, as being a point in 'the old line, and shown upon the plats at the *black letters, W. G.*

This point is by latitude, 77686.8 feet North, and by departure, 7091.4 feet East of 'Potomac Spring', the perpendicular distance East of the 'Bauer-Michler Meridian' being, 1128.4 feet.

6th. A cherry tree, pointed out to me by Samuel Teets, a witness produced upon the ground on behalf of the State of Maryland, as being a point in 'the old line', and said point is shown upon the plat at the *black letters, W. H.*

The perpendicular distance of the said point East of the 'Bauer-Michler Meridian', is 1547 feet.

7th. A point where a red oak tree formerly stood, pointed out to me by Ethbell Falgenstine, a witness produced upon the ground on behalf of the State of Maryland, as a point in 'the old line', and shown upon the plats at the *black letters, W. K.*

This point is by latitude, 128896 feet North, and by departure, 8446.8 feet East of 'Potomac Spring', the perpendicular distance East of the 'Bauer-Michler Meridian' being 2495.6 feet.

8th. The remains of an old fence, pointed out to me by Taylor Friend, a witness produced upon the ground on behalf of the State of Maryland, as a a point in 'the old line', and is shown upon the plats at the *black letters, W. J.*

This point is by latitude, 160787.5 feet North, and by departure, 8920.6 feet East of 'Potomac Spring', the perpendicular distance East of the 'Bauer-Michler Meridian' being 2976 feet.

9th. A fence, pointed out to me by Isaac Myers, a witness produced upon the ground on behalf of the State of Maryland, as being a point in 'the old line', and is shown upon the plats at the *black letters, W. L.*

This point is by latitude, 164716.8 feet North, and by departure, 8913.8 feet East of 'Potomac Spring',

the perpendicular distance East of the 'Bauer-Michler Meridian', being 2971.1 feet.

10th. A fence, pointed out to me by Samuel M. Fike, a witness produced upon the ground on behalf of the State of Maryland, as being a point in 'the old line,' and is shown upon the plats at the *black letters W. M.*

This point is by latitude, 172549.7 feet North, and by departure, 8909.2 feet East of 'Potomac Spring', the perpendicular distance East of the 'Bauer-Michler Meridian; being 2957.5 feet.

11th. An old mound, in the Mason and Dixon Line, pointed out to me by Abram J. Thomas, a witness produced upon the ground on behalf of the State of Maryland, as being a point in 'the old line', and which said point is shown upon the plats at the *black letters W. Z.*

This point is by latitude, 183079.7 feet north, and by departure, 8910.9 feet East of 'Potomac Spring', the perpendicular distance East of the 'Bauer-Michler Meridian' being 2970.6 feet."

Mr. Brown's testimony as to his location of points in the old line. is found on pages 1037 to 1039, inclusive, as follows:

Q. Did you locate, by actual survey, any point or points in what is termed the old Deakins line; if so, please state what points you located and how they are designated upon the plats?

A. The first point which I located in what is termed the old line, was a white oak tree, pointed out to me by Lloyd Dawson, a witness produced on the ground on behalf of the State of Maryland, as a point in the old line. This tree was blocked and the marks in concentric rings were found to be not so much over forty years. This point is by latitude 35697 north, and by departure 6121 1-10 feet east of the Potomac Spring, and the perpendicular distance from the Fairfax Meridian is 148 3-10 feet east. This point is designated on the plot by the *black letters W. C.*

Defendant objects to statement that this tree was pointed out by Lloyd Dawson as in the old line.

(Witness.) The second point located was a thorn stump, pointed out to me by Francis Martin, a witness produced on the ground on behalf of the State of Maryland, as a point in the old line.

Objection by defendant.

This stump is indicated on the map by the black letters W. D. and its latitude is 381514 4-10 feet north, and its departure 6137 9-10 feet east from the Potomac Spring, and the perpendicular distance is 135 6-10 feet east of the Fairfax Meridian.

Q. Are Lloyd Dawson and Francis Martin, the witnesses to whom you have referred, living or dead?

A. They are both living, so far as I know, or were, a short time ago.

Q. The next?

A. Fence pointed out to me by Peter F. Nine, a witness produced on the ground on behalf of the State of Maryland, as a point in the old line. This point, the fence, is shown upon the plot at the *black letters W. E.*

")

Objected to by defendant.

(Witness:) And said point is by latitude 42276 feet north, and by departure 6190 2-10 feet east of the Potomac Spring, the perpendicular distance east of the Fairfax Meridian being 219 feet. Fourth, a whiteoak tree, pointed out to me by Julius K. Monroe standing on Stahl's Hill, and shown upon the plot by the *black letters W. F.* The latitude of this point is 44420 feet north, and its departure 6230 5-10 feet east of the Potomac Spring, the perpendicular distance east of the Fairfax Meridian being 259 7-10 feet.

Defendant objects to the statement of the distance pointed out by Mr. Monroe.

(Witness:) Fifty, the fence pointed out to me by J. W. Jones, a witness produced on the ground on behalf of the State of Maryland, as being a point in the old line, and shown on the plots by the *black letter G.* This point is by latitude 77686 8-10 feet north, and by departure 7941 4-10 feet east of the Potomac Spring, and the perpendicular distance east of the Fairfax Meridian is 1128 and three tenth feet.

Defendant objects to the evidence of Jones having pointed this out.

(Witness:) Sixth, a cherry tree pointed out to me

by Samuel Teats, a witness produced upon the ground by the State of Maryland, as being a point in the old line—

Objection by defendant.

(Witness:)—and shown upon the plot in *black letters W. Y.* The perpendicular distance is 1547 feet east of the Fairfax Meridian, and the latitude. Seventh, a point within the lines of the Diadem, and near the fourth line of said tract, where a red oak tree formerly had stood, was pointed out to me by Ethbell Falkenstein, a witness produced upon the ground on behalf of the State of Maryland, as a point in the old line.

Objected to by defendant.

(Witness:) This point is shown upon the plot at the *black letters W. K.* and its latitude is 128896 feet north, and its departure 8446 8-10 feet east of the Potomac Spring. The perpendicular distance east of the Fairfax Meridian being 2495 6-10 feet. Eighth, the remains of an old fence pointed out to me by Taylor Friend, a witness produced upon the ground on behalf of the State of Maryland, as a point in the old line.

Defendant objects.

(Witness:) And being shown upon the plots *at black letters W. S.* This point is by latitude 160287 5-10 feet north and by departure 8920 6-10 feet east of the Potomac Spring, the perpendicular distance east of the Fairfax Meridian being 2976 feet. 9th, a fence pointed out to me by Isaac Meyers, a witness produced on the ground on behalf of the State of Maryland, as being in the old line.

Defendant objects.

(Witness:) And is shown upon the plots by the *black letters W. L.* The point thus located is 164716 8-10 feet north, and its departure 8913 8-10 feet east of the Potomac Spring, the perpendicular distance 2971 1-10 feet east of the Fairfax Stone. 10th, a fence pointed out to me by Samuel M. Fike, a witness produced on the ground on behalf of the State of Maryland, as a point in the old line—

Defendant objects.

(Witness:)—and shown upon the plots by the *black letters W. M.* The latitude of this point being 172249 7-10 feet north, and its perpendicular distance 2957 5-10 feet east of the Fairfax Meridian and its departure. The 11th point in the Mason & Dixon Line, was shown me as a point in the old line by Abram J. Thomas.

Objection by defendant.

(Witness:) This point is designated on the plot by the *black letters W. Z.* and the latitude being 183079 7-10 feet north of the Potomac Spring, and the departure 8910 9-10 feet east of the Potomac Spring, the perpendicular distance being 2790 6-10 feet east of the Fairfax Meridian. In addition to the points that I have here mentioned, I was shown a spring in the town of Cranesville, pointed out to me by John P. Lewis, a witness produced on the ground on behalf of the State of Maryland, and also by Thomas Browning, a witness produced in a like cause, and according to the testimony of said witnesses said Deakins line ran across the water of said spring.

Defendant objects to this witness interpreting the evidence of other witnesses.

(Witness:) The latitude of this spring is 122230 7-10 feet north, and the departure is 4267 7-10 feet east of the Potomac Spring, the perpedicular distance at the same time being 1658 feet west of the Fairfax Meridian, said spring is designated on the plot with the word and black letters spring, and the black letters, W. J."

Before we discuss these points located in the old line by Mr. Brown, we desire to call attention to certain points fixed by Mr. Monroe in this old line, and also certain evidence derived from the calls of the Virginia patents along this line.

Going North from the Fairfax Stone the first point is the beginning corner of a tract of 72 acres patented to John Hoye by the State of Virginia, December 31st, 1844, according to a survey made by Reuben Morris, surveyor, May 28th, 1844 (Record, pages 486 and 487). The description given in this survey and grant is as follows:

> "Beginning at a large maple and pine *on the bank of the North branch of the Potomac River on the Maryland line, thence North* 240 *poles with the Maryland line, &c.*

This tract of land is located on the Virginia side just North of where the Fairfax Meridian crosses the river. The beginning point is designated by red *"A12."* It cannot be disputed that this tract of land is correctly located. We have already given Mr. Monroe's report and testimony upon the location of the beginning corner of Military lot No. 1101, located by Francis Deakins under the authority of the State of Maryland. This beginning point is designated on Mr. Monroe's map by *red "A1."* The next object located by Mr. Monroe was a large and anciently marked hemlock 200 poles North of the Stone and maple at the beginning of lot No. 1101; which hemlock was marked fore and aft, North and South, and is indicated on his map by *red "A2."* (Record, pages 1635 and 1636.) Going further North Mr. Monroe found a large and anciently marked hemlock at 744 poles from the Fairfax Stone, 4-10 of a pole East of his line and on the same line practically as the stone and maple, corner to lot 1101, and hemlock designated "A2". This second hemlock is designated on his map *by red "A3."* It was marked fore and aft and appeared to be ancient. Going further North at 1107.2 poles, Mr. Monroe located a large chestnut oak marked as a corner with a stone pile and pointers. This is indicated on the map *by red "A4"*, also the *figures "1107.2."* This chestnut oak, stone pile and pointers is located as a corner of the Wilson, Morris & Byrne tract of 600 acres, now known as the Loar tract. His patent and survey are found on pages 490 and 491 of the Record, being Exhibit No. 14 with defendant's answer. It grants:

> "A tract containing 600 acres, lying in Preston County on the head of Yough River and the North branch of the Potomac, and adjoining the Maryland line, John Hoye's 72 acre survey, and Hillery Griffin's survey (of 100 acres, assignee of Buckner Fairfax), and bounded as follows, viz: Beginning at pointers on the Maryland line and corner to John Hoye's, deceased, 72 acres, thence with a line of the same S 59 W 66 p..... to a corner of F. & W. Deakins survey of 2000 acres, N 6 West 70 p, E 125 p to the Maryland line, and with the same S 514 to the beginning, with its appurtenances."

This patent is dated February 1st, 1854, on a survey made April 27th, 1853, by Reuben Morris, surveyor. Mr. Monroe has located this on his map and designated it by the words "Wilson, Byrne & Morris", also the word "Loar" and "E. C. Wilson 600." This extends about three miles and one-half above the Fairfax Stone. It is clear that if the John Hoye patent for 72 acres is correctly located, of which there can be no doubt, then this Wilson, Byrne & Morris survey is also correctly located by Mr. Monroe. This also appears from the testimony of C. H. Loar (Record, page 1596), which has already been briefed, ante page..... He shows that the boundary line here was shown by George Mosser, whom the plaintiff relied upon as one of its witnesses for the location of lands and other information about ancient boundaries, and, besides it was shown to him by Eli Mosser a son of Reuben Morris. It seems that Reuben Morris was the surveyor who made the survey upon which the patent issued, and also was afterwards the owner of the land and sold it to D. H. Loar, the father of this witness, so that the location of this tract of land is established beyond all question, and its Eastern boundary conforms to what the State of West Virginia claims to be the old line, and what has so been recognized by these old people and surveyors.

Mr. Monroe also located a hemlock tree at 1189.8 poles from the Fairfax Stone in practically the same line designated on his map by *red "A6,"* and at 1201.6 poles he located a dead hemlock marked on the fore and aft, North and South sides, which he has designated on his map as *red "A7."* At 1251.6 poles he passed 2-10 of a pole to the left of an old chestnut, marked as a side line on the West side. This is designated by *red "A8"*. The Wilson, Byrne & Morris survey of 600 acres, as will be seen by its location on Monroe's maps Nos. 1 and 2, extends Northward to about the four mile point from the Fairfax Stone. This four mile point is designated on map No. 2 by *red "B1,"* also by *black "4M"* and a dot. The next point designated by Mr. Monroe is the beginning corner of the Mt. Pleasant Maryland patent granted to Baker Johnson May 22nd, 1787. It describes the beginning corner as follows:

> "Beginning at a bounded white oak *standing on the North line drawn from the fountain head of the North branch of the Potomac River*, and near the West side of the road leading from Arches Spring Glade to Tygers Valley, and running thence South, &c."

Mr. Monroe testifies that the beginning corner of the Mt. Pleas-

ant patent is designated on his map by *red "B2"*. It will be noticed that this point is substantially in the Michler line and is considerably West of the line upon which the other objects heretofore designated are located. It will also be noted that this Maryland survey was made in 1787, prior to the running of the Deakins line, and conforms in its location to the Pettyjohn and Goff surveys, lying along the same line on the Virginia side North of it, and which were granted also, which we have heretofore shown, prior to 1789. We find, therefore, that along in this locality where these old surveys had been made before the Deakins line was run, the holdings have been to the line of these old surveys rather than to the line evidently run by Deakins a little East of these surveys. This condition extends as far as the Goff and Deakins lands extend beyond the Royal Charlotte, to the William Ashby survey of 300 acres, and beyond the ten mile point on the Monroe line. This space is covered by the Osborne, Pettyjohn and three surveys of John T. Goff and William Deakins survey of 200 acres, all made prior to 1789. It indicates that the old line, by whomsoever it was run, conforms closely to the Michler line and was more nearly a due North meridian than the line run in 1789 by Francis Deakins, and that these people along this section have always held to this old line rather than to the Deakins line.

Mr. Monroe testifies, on page 1639, that he located the Pettyjohn 330 acres from sugar pointers shown him by John Slaughbaugh as the point where the original cherry stood, called for in the John Pettyjohn patent. Slaughbaugh lived on the tract at the time. He is now dead. This is designated by *red B3"*. There is a fence along there. He testifies that the other two Pettyjohn surveys, one for 330 acres and one for 400 acres, were laid down from surveying done by him, and partly by protraction. (Record, page 1640.) Mr. Monroe also located on his map a corner of the land of Lloyd Dawson, adjoining D. E. Offutt. This is designated by *red "C2,"* also a small stone planted near the edge of the Northwestern pike 25 poles West of Monroe's line. This stone is designated on the map by *red "C13."* It is in the same line with "C2", and corresponds with the line of the fence, which is the eastern boundary of the Offutt land. This Offutt land is a part of the Goff surveys. On page 1641 and 1642, Mr. Monroe testifies as to the location of these Goff patents. He found none of the original corners on the ground, but the patents all call to run to the Maryland line and call for each other and are located with reference

to the other tracts and natural monuments. He also located a sugar tree pointed out to him by Peter F. Nine, designated on the map by *red "C3"*, which is in the same line with the other points just mentioned. Going back to the point on the line just below the Royal Charlotte, marked on Monroe's map by the *black letters "WC"* in a red circle, Mr. Brown, on page 1037, says that this point is designated on his map by the black letters "WC", and that it represents a white oak tree, pointed out to him by Lloyd Dawson as a point in the old line. He blocked this tree and the marks counted not much over forty years. This point is in the same line with the other points which have been indicated by Mr. Monroe as being in the old line. Going further North just beyond the Northwestern pike, is the point designated on Mr. Monroe's map No. 1 *by black letters "WD," enclosed in a red circle*. Mr. Brown testifies, on pages 1037, that this point was a thorn stump pointed out to him by Francis Martin, a witness produced on the ground on behalf of the State of Maryland, as a point in the old line. This is in the same line with the other points fixed by Mr. Monroe as in the old State line.

Going further North to a point *marked "WE," enclosed in a red circle*, at the lower Southwest corner of a small tract called Eelshine. Mr. Brown testifies, on page 1037, that there is a fence here that was pointed out to him by Peter F. Nine, a witness produced on the ground on behalf of the State of Maryland, as a point in the old line. This point is in the line with the point "CE" in the upper Northwest corner of Eelshine, which was pointed out to Mr. Monroe by Mr. Nine as in the old line. The next point which Mr. Brown locates, as in the old line, is the point indicated by *black letters "WF", enclosed in a red circle*, on Mr. Monroe's map No. 1. All these points are also shown on Mr. Brown's map by the same letters. These locations made by Mr. Brown, the surveyor of Maryland, confirm the location of the points in the old line made by Mr. Monroe.

This tract of Eelshine was patented to Archibald Chisholm by the State of Maryland February 28th, 1854, on a survey made January 5th, 1849 (Record, page 1779.) The description contains the following language:

> "Beginning at the end of the first line of lot No. 316 and running thence S 26 degrees W 90 perches *to the Virginia and Maryland line*, then *with said line N 384 perches* to a bounded sugar tree."

Mr. Monroe testifies, on pages 1643 and 1644, that this description conforms to the location of that tract, as he has it on his map, and as compared with Military lot 316 referred to. This is a grant by the State of Maryland in 1854, recognizing the Maryland and Virginia line as located by the Western line of this survey. Mr. Monroe testifies, on pages 1642 and 1643, that his location of the Royal Charlotte and of the Military lots 316, 317 and 318 is substantially the same, with reference to the Michler line, as Mr. Brown's location of said tract and lots; and on page 1644, he testifies with reference to the location of these various tracts, as follows:

> "232nd Q. How have you located the Goff tracts of five hundred acres and eight hundred and sixty eight acres in relation to said tract "Eelshine?"
>
> A. Located it adjoining and on the west.
>
> 233rd Q. So that if the Eelshine correctly calls for the Maryland line on the one side, and they call for it on the other, you have made a common line between them have you?
>
> A. Yes, sir.
>
> 234th Q. If then the Royal Charlotte is correctly located and the military lots three hundred and sixteen, three hundred and seventeen, and three hundred and eighteen, and the Eelshine tract, and the latter tract is on the Maryland line, then, what have you to say as to the Goff five hundred acre tract, eight hundred and sixty eight acre tract and one thousand acre tract?
>
> A. They would also bound on the Maryland line.
>
> 235th Q. Those three Goff tracts call for each other along that line, do they not?
>
> A. They do.
>
> 236th Q. What about the Pettyjohn tracts lying south of the Goffs?
>
> A. The Goff tracts rather call for the Pettyjohn.
>
> 237th Q. A common corner along the Maryland line?
>
> A. Yes, sir, and the Pettyjohn being the senior title, the Goffs are laid to that.
>
> 238th Q. I hand you a paper, being a copy of a patent by the commonwealth of Virginia to Zerah Osborne for six hundred and sixty acres, and ask you to file the same with your deposition.
>
> A. I will file the same marked 'Monroe Ex. No. 6.'

239th Q. Have you located that Zarah Osborne tract on your map?

A. I have.

240th Q. How is it designated?

A. It is designated by the words 'Zarah Osborne.'

241st Q. These original tracts are shown on your map No. 2, are they not?

A. Yes, sir; shown on map No. 2 marked 'Zarah Osborne 660.' It will be on that.

242nd Q. As well as your map No. 1—

(By Mr. Sinnell.:)

Q. Did you locate that by actual survey?

A. It is located by the Slaughbaugh papers.

Objection by the counsel for the State of Maryland to any evidence as to the location of the Zarah Osborne six hundred and sixty-acre tract, because it was not located on the ground by the witness.

243rd Q. This Zarah Osborne patent calls to begin at pointers in the Maryland line, corner to John Pettyjohn and running with the Maryland line due south two hundred and eighty two poles to a maple. Does your location of that tract on the map conform to that common corner with the Pettyjohn?

A. It does.

Exception to the answer by counsel for the State of Maryland.

244th Q. And if the Pettyjohn surveys and the Goffs and the Eelshine and the Royal Charlotte and the three military lots three hundred and sixteen, three hundred and seventeen and three hundred and eighteen are correctly located, what would you say with reference to this Zarah Osborne tract?

A. I should say it was also correctly located on the map."

The Goff patents are found on pages 1776, 1777 and 1778 of the Record. (See description taken from the Goff 1000 acres, ante, page.....).

The Goff tract of 868 acres calls for his other surveys, and the Goff patent for 500 acres, describes the land as "lying and being in the county of Monongalia, adjoining the Maryland line and on

N. side of lands surveyed for said Goff and bounded as followeth, to wit, Beginning at a maple corner to his other lands and on the Maryland line and running with said line N. 160 poles to a hickory, &c."

Mr. Monroe also located the Maryland patent for a tract called "Buckdale," granted to Jesse Ashby March 21st, 1867, on a resurvey made November 18th, 1848. This is located on the same territory covered by lots 319 and 320 of the Military lands. It calls to begin at the original beginning of lot No. 319, it being the end of the third line of lot No. 318. This point is designated on Mr. Monroe's map by *red "C4".;* and in the body of the description calling for a line running "South, forty three degrees West, two hundred and two perches, to a White Oak Sapling *standing on the Virginia line as shown by William Ashby,* and *with said line, South, sixty perches;* then East, sixteen perches, to the end of the sixth line of Lot No. three hundred and eighteen, and with the lines of said Lot reversed, the remaining courses" are given to the beginning. This Buckdale patent is found on pages 1780 and 1781 of the Record.

Mr. Monroe also located a patent to William Ashby for 50 acres, dated August 1st, 1851, from the State of Virginia. This lies just West of Buckdale, between the William Ashby 300 acres and William Deakins, Jr. 200 acres. On page 1697 of the Record, Mr. Monroe explains this location, as follows:

> "699th Q. I hand you a certified copy of a patent to William Ashby for 50 acres, dated August 1st, 1851, and I will ask you to file the same with your deposition.
>
> A. I will do so, marked 'Monroe Ex. No. 63.'
>
> 700th Q. Is that 50 acres laid down on your map?
>
> A. It is.
>
> 701st Q. Where, and how is it designated?
>
> A. It is laid down by solid lines, enclosing the name 'William Ashby' and the figures '50'.
>
> 702nd Q. It appears to be located between the William Ashby 300 acres and the Williams Deakins, Jr. 200 acres. Why did you so locate it?
>
> A. This tract of land is described in the patent as beginning at the end of 177 poles on the given (last) line of William Ashby 300 acre tract, thence south 43 1-4 west 176 poles to two dead cherry trees,

two maples, three spruce pines on the west bank of Yough river, and east 158 poles from a pine marked as a corner, the line crosses Wilt's corner, at the end of 30 1-4 poles, and the road leading from Wilt's to Martin's at the end of 150 poles to a pine marked 'W. A.' and crosses Yough, thence south 82 east 115 poles, recrosing said Yough to pointers, *corner to Buckdale in the Maryland line*, and with the same north 142 poles to the beginning. This tract is laid down with its beginning at the end of 177 poles on the given line of said Ashby survey as it is located on the map.

Objected to because the description does not conform to that in the grant.

703rd Q. Has it a common line with the William Ashby 300 acres?

A. Yes, sir, the first line of the 50 acre tract is south 43 1-4 west. The last line of the Ashby 300 acre tract or the given line is north 43 1-4 east.

704th Q. This 50 acre Ashby patent calls for its second line to run south 82 east 115 poles, recrossing said Yough river to pointers, the Buckdale corner in the Maryland line. Will you indicate on your map where that point calling for the Buckdale corner in the Maryland line is.

A. That point is indicated on the map at red 'C9'.

705th Q. Is that a corner of the Maryland Buckdale tract as it is located on your map?

A. It is.

This point *red "C9"*, shown on Mr. Monroe's map, makes a setoff in the old line eastward from the point *red "C3"*, and from this point it runs Northward by a continuous line a long distance. The William Ashby 50 acre patent is found on page 1857 of the Record; "Monroe Exhibit 63." It is described as a certain tract or parcel of land containing 50 acres, in Preston County, on the waters of Yaughogheny, adjoining Wilts Watering and the Maryland line of William Ashby. The last line is as follows:

"Crosses Yaugh Thence S. 82 E. 115 poles recrossing said Yaugh to pointers (Buck Dale corner) in the Maryland line with the same N. 142 poles to the beginning."

The States of Maryland and Virginia were therefore granting

lands about the same time on each side of this line, as claimed by William Ashby. Mr. Monroe then located the William Ashby 300 acre tract granted by the State of Virginia to William Ashby February 2nd, 1787. (Record, page 1782.) This description is:

> "A certain tract or parcel of land containing 300 acres, by survey bearing date the 21st day of March, 1785, lying and being in the County of Monongalia on a main branch of the Yohogania River, adjoining the Maryland line and bounded as followeth, to-wit:"

This tract, will be seen, crosses the Maryland line. It is located from a cherry tree pointed out by Michael Shafer to Mr. Monroe, and the same tree pointed out by Parker Ashby to Mr. Brown, and is designated on Mr. Monroe's map by red "C5". This point is not in any line. That portion of this William Ashby survey which lies East of the old line as clamied by William Ashby, above mentioned; that is, the line running North from the point *red "C9"*, is covered by a Maryland patent called a "Ninesburg", for 34 3-4 acres, patented February 1st, 1849, on a survey made the 12th day of September, 1827.

Parker Ashby testifies as to this Ninesburg tract, when he was called as a witness on behalf of the State of Maryland, (Page 1086 of the Record) as follows:

He testifies that he is a resident of Garrett County, Maryland; that he showed Mr. Brown a stone, corner of the William Ashby 300 acre tract. His father owned 116 acres of this tract—the East end of it. This William Ashby 300 acre tract is located on Mr. Brown's map, and the point shown him by Parker Ashby is designated by the letter black "P", on the Maryland side. He says that this is the point where a wild cherry, the original corner, stood as shown him by his grandfather; and he says that Mr. Monroe, when he ran in 1894, ran East of this corner. Mr. Ashby then testified that this part, lying East of the line run by Monroe, was taken up under a Maryland patent. Witness says that he lives in this corner about 140 to 200 yards from the corner marked "P"; that the line running from the corner at P runs through his yard. He says that the land belongs to one of his brothers, and on the other side belongs to him. It all belonged to his father once; that he lives on the 300 acre tract; that part of it in Maryland was taken up under a Maryland patent by the name of "Nine" or "Ninesburg." He says that the tract called "Maryland", does not cover any

part of this 300 acre tract, but that he has a patent at home for 34 acres, he thinks, called "Ninesburg Tract".

(Note: We do not see that this patent has been copied into the Record. It seems to have been overlooked.)

Now, lying between this William Ashby 300 acres and that part of it covered by the Ninesburg Maryland patent, is another Maryland patent called "Sextile", for 108 1-2 acres, surveyed December 12th, 1827, and patented April 7, 1837, to————————. This patent conforms to the same line as the Buckdale and the Ninesburg, being a due North line from the point red "C9", so that all that portion of the old William Ashby survey, which lies in Maryland, together with the adjoining lands on the South between it and the Military lot No. 318, has been covered by more recent Maryland patents calling for the Maryland line running North from the point red "C9". We call the attention of the Court to the testimony of Peter F. Nines, John R. Bowman, Joshua H. Bowman, Daniel Bowman and Parker Ashby, with reference to the location of these lands along this line and the present holdings, taken in August, 1896, before any testimony was taken by the State of Maryland in this case, or any surveying done by her, found on pages 1417 to 1427 of the Record. Of these witnesses, Peter F. Nines and Parker Ashby live in Maryland. The Bowmans claim their residence in West Virginia. For conveniene, we give this testimony in brief as follows:

Peter F. Nines testifies, (page 1417) that he is forty-nine years old; resides at Sunnyside, Garrett County, Maryland, and has lived there for twenty-four years on soldier lots, part of the Royal Charlotte. His lots are 317 and 318, and he has also recently bought 316. The Military lot No. 318 adjoins the Buckdale tract of land on the North; that Buckdale calls for his beginning corner. He got title for the Military lots from his father. His grandpap lived on these lots. He bought out the heirs. His grandfather was Peter Martin, on his mother's side. He made the first improvement on these lots and died during the War; lived on them at the time of his death. He says that Monroe's line, run in 1894, was about half way between the Military lots and what we call the old State line, the Deakins line, twelve or fourteen rods West of the Military lots. He testifies that Eelshine tract lies between and what we call the old State line, the Deakins line; that the Eelshine tract extends as far North as the Northern line of his Military lot 318, and as far South as lot No. 316; that

witness owns the Eelshine tract now; had bought it about a month before from John Mitchell. A man by the name of Roomer lives on it now, in a house that was built about two years before. The Goff lands join the Eelshine on the West. They are owned by Dan Offutt; that there is a 50 acre tract that the Ashbys have taken up. This 50 acres adjoins the Eelshine on the North. The Michler line is West of the Eelshine tract about 15 or 16 rods.

The Court can see that by comparing this witness's testimony with the Monroe Map No. 1, the locations of these Military lots, the Eelshine, the Goff lands and the Ashby 50 acres conform exactly to the testimony.

John R. Bowman testifies that he is thirty-four years of age; resides in Preston County, West Virginia, and that he owns land adjoining the boundary line between Maryland and West Virginia. The land was bought from W. H. Glover, who got it from Thomas Listen, who bought it from Thomas Coddington. He says this is a part of the William Ashby tract and part of Michael Wilt tract; that it extends across the Eelshine; that he claims the Maryland line to be on the Eastern side of the Eelshine, and his line runs across it. It is assessed in West Virginia, and he pays taxes there. It is part of what is known as the Goff lands. His deed is found on page 1523 of the Record, and it calls to a pine in the Maryland line; thence with said line, bearing corrected S. 3 degrees W. 116 poles to a stake, corner to the Irish tract, &c. He knows the 50 acre tract patented to William Ashby. It is now owned by his brother, Daniel R. Bowman. It lies North of the Eelshine tract. It is assessed and taxes paid on it in Preston County, West Virginia.

Joshua H. Bowman's testimony is to the same effect.

Daniel Bowman's is to the same effect, but, in addition, he testifies that their lands extend farther East than the Monroe line; that he owns the 50 acre Ashby tract; that it adjoins Buckdale. There is no Maryland title claimed by anybody to cover the 50 acre Ashby tract, nor any Maryland title to cover that part of the 300 acre tract, which he owns.

Parker Ashby tetsifies that he is fifty-two years old; resides in Garrett County, Maryland; is acquainted with the old 300 acre tract of land patented to William Ashby, his great grandfather, and that he resides now within the original lines of that old tract, and has resided there since 1854. His father's name was Thomas Wilson Ashby. He says a part of the 300 acres patented to Wil-

liam Ashby was taken up under a Maryland grant by a man by the name of Saucer—Jahn Saucer; that he knows where the Michler line was run, and that before it was run there was an old line there recognized as the Maryland boundary line; that the house he lives in is situated East of the Michler line, and also East of the old line; that the old State line was always recognized as the boundary line on the West side; it was near the line as run by Mr. Monroe.

The next tract located by Mr. Monroe along the line is the John Hoye patent in Virginia for 500 acres, and the Maryland patent to Conrad Nine for 1304 acres, lying opposite each other. Mr. Monroe testifies (Record, pages 646 and 647) as follows as to the location of these tracts:

> 257th Q. The next tracts I see north of the William Ashby three hundred indicated on your map are the John Hoye tract of five hundred acres and the 'Maryland' tract of one hundred and thirty and one fourth acres. How did you locate those tracts on your map?
>
> Mr. Sincell: Did you locate them by actual survey on the ground?
>
> A. I ran some of the lines out, did not run them all. The tract 'Maryland' was located on the map by a partial survey from a point shown me, I believe, by Michael Shafer, which point is the end of the fourth line of the tract Maryland and the beginning corner of the William Ashby three hundred acre tract. I ran the fifth line by its calls, of the tract Maryland, and the balance is laid down by protraction.
>
> 258th Q. I hand you a certified copy of a Virginia patent to John Hoye for five hundred acres, and ask you to file the same with your deposition.
>
> A. I file the copy marked 'Monroe Ex. No. 9.'
>
> 259th Q. This five hundred acre survey calls to begin at a hickory, two red oaks and an ash standing at the end of the first line of William Ashby's survey of three hundred acres, and running with the second and third lines thereof south fifty one west one hundred and twelve poles to a chestnut and two hickories, etc. I will ask you to look at the description contained in this patent, and state whether your location of that tract on your map corresponds with that description, so far as the adjacent lands are concerned?
>
> A. It does.
>
> 260th Q. If, then, the William Ashby three hundred acres is correctly located by yourself and Mr. Brown,

is the John Hoye five hundred acres properly located on your map?

A. It is.

261st Q. In the description of this John Hoye five hundred acres, it calls to run north eighty and one half east twelve poles to the Maryland line, and with it south one hundred and ninety eight poles to a stake in a line of William Ashby's survey of three hundred acres. How is the point on the Maryland line there called for designated in your map?

A. By red *letter C, figure 6.*

262nd Q. In that locality, did you locate any tree on the ground, a corner tree?

A. At the end of three thousand, seven hundred and fifty and eight tenths poles. I ran a reference line south seventy five west six and six tenths poles to a large chestnut stump. The reference line on the map is a little bit out of place. The paper must have shifted a little bit on the original map. It is now marked by a stake and stone pile, and supposed to be the original corner of the Hoye five hundred acre tract and the William Ashby two hundred acre tract, and also a corner of the Hooker tract. This point is indicated on the map by red letter *'C1'*.

263rd Q. Is that point designated on the map of Mr. Brown in this case?

A. It is.

264th Q. How?

A. It is represented on Mr. Brown— map by black letter "Q".

265th Q. Look at the map filed with the deposition of H. J. Freer, taken today in this cause, marked 'Freer Ex. No. 1', and state whether that point which is designated on your map *as 'C1'* and on Mr. Brown's map by the black letter 'Q', and state whether that point is indicated on the said map filed with the deposition of Mr. Freer.

A. It is, by the letter and figure *'C1'*.

266th Q. I hand you a certified copy of the William Ashby survey of two hundred acres granted by the Commonwealth of Virginia February 2nd, 1787, and ask you to file the same with your deposition.

A. I will, marked 'Monroe Ex. No. 10.'

267th Q. You have stated that the adjacent corner indicated on your map by the red letter C1, is the beginning corner of the Ashby two hundred acres, or supposed to be. I will ask you to state what is called for as the beginning corner of that survey.

A. A chestnut is called for as the beginning corner of the survey, and I subsequently ran the lines on that tract from that stump as the beginning corner.

268th Q. Is that tract located then upon your map correctly from the beginning corner, as you ran it on the ground?

A. It is."

This John Hoye patent for 500 acres is "Monroe Exhibit No. 9" (Page 1783), and is dated March 30th, 1843, on a survey made August 31st, 1842. It is described as follows:

> "A certain Tract or Parcel of Land, containing five hundred acres lieing and being in the county of Preston on the waters of Youghogany river and adjoining the lands of William Ashby's surver of 200 acres now Henry Lowers and William Ashby's survey of 300 acres now Conrad Nine *adjoining the Maryland line* and extending west to the lines of a survey of Frances & William Deakins and bounded as follows to wit: Beginning at a hickory two red oaks and an ash standing at the end of the first line of William Ashby's survey of 300 acres"

and then toward the end of the description, has this call:

> "N. 88 1-2 E. 12 poles *to the Maryland line & with it S. 198 poles to a stake* in a line of William Ashby's survey of 300 acres, and with it N. 51 W. 13 poles to the beginning."

This point on the Maryland line is designated on Mr. Monroe's map by *red "C6"*, immediately East of that a very slight distance is located a tree as the original corner of the Hoye 500 acre tract and the William Ashby 200 acre tract and of the Hooker tract. This point is designated on the map by *red "C1."* It is directly in the line North from the point *red "C9"*. This point is also designated on the map of Mr. Brown by the *black letter "Q"*; also shown on the maps of the lands of the Preston Lumber & Coal Company, filed with the deposition of H. J. Freer, as "Freer Exhibit A", at the end of the line marked "Deakins old State Line", and indicated by the letters *"C1"*. Mr. Freer's testimony is found on pages 1616 to 1614.

He testifies that he is the land agent and surveyor of the Preston Coal Company; that he prepared two plats, and that this plat

shows the Hoye patent for 500 acres, with its relation to adjacent lands and the Michler and old State line. And he testifies that this property is correctly laid down on Monroe's Map No. 1, and that the chestnut stump, which marks the Northeast corner of the Hoye patent is designated by the *letters "C1"* on Monroe's map, and, at the request of counsel, he puts the *same letters "C1"* on the map filed by him. He testifies that these lands are all assessed for taxes and the taxes are paid in Maryland.

The tract called "Maryland", for 130 1-4 acres, patented to Conrad Nine January 23rd, 1823, according to a survey made August 10th, 1810, is found on page 1864, of the Record. This recites that John Hoye of Allegany County, had surveyed and laid out for him a parcel of land called "Maryland", containing 130 1-4 acres, and has, by assignment, transfered the same to Conrad Nine. It would appear from this, therefore, that John Hoye, the patentee of the 500 acres, took out this Maryland patent on that portion of it lying East of the old State line. The call showing this is as follows: after calling for certain lines of a tract called "Piney Bottom", it reads:

> "Then leaving the lines of 'Piney Bottom,' and running thence south thirty six degrees west, eighty six perches; north, sixey two degrees west, ninety five perches *to the Virginia and Maryland line, as run under the direction of Francis Deakins at the time of laying out the lots to the westward of Fort Cumberland, and thence running with the said line north, two hundred and ten perches; thence by a straight line to the beginning."*

According to the locations and the evidence in this case, they regarded the Maryland line at that point as it is shown on Monroe's map, either running to the point *red "C1"* or *red "C6."* Red "C6" apparently is the point called for and adopted by Mr. Monroe, it being also in a direct line with the Military lots, directly North, Nos. 242, 243, and 244, as well as the lots 316, 317 and 318 farther South, and also the lots 1237 to 1245, inclusive, farther North.

Just North of the John Hoye 500 acres, Mr Monroe locates the William Ashby 200 acres. This patent is dated February 2nd, 1787, on a survey dated March 21st, 1785, found on page 1784 of the Record. The description is as follows:

> "There is granted by the said Commonwealth unto

> William Ashby, assee of John Simpson a certain tract of parcel of land, containing 200 acres by survey bearing date the 21st day of March, 1785, lying and being in the County of Monongalia on the waters of Snowy Glade creek *adjoining the Maryland line*, including the said Ashby's sugar camp & bounded as followeth, to-wit: Beginning at a Chestnut N. 29 degrees W. 220 poles to a pine tree, thence N. 5 degrees W. 72 poles to a beech, &c."

This chestenut called for as the beginning, is located both by Mr. Brown, in locating the Hooker tract, and Mr. Monroe, in locating this 200 acre tract and the John Hoye 500 acres at the point designated on Monroe's Map No. 1 by red "CI", and on Mr. Brown's Map by the letter "Q".

The next survey that is located Northward is the John Hooker survey for 2251 acres, dated April 17, 1788—"Monroe Exhibit No. 60." (Record, page 1854.) Mr. Monroe testifies, on page 1696, that his location of this Hooker survey is substantially the same as that of Mr. Brown, both being located from the same point. Mr. Brown, in his report, (Page 966) speaking of the location of this survey, says:

> "I began said survey at the beginning of said 26th line, at a bounded chestnut tree, near a fallen red oak, pointed out to me by Dorsey L. Ashby and Jesse J. Ashby, Jr., witnesses produced upon the ground on behalf of the State of Maryland, as the Southeast corner of the 'Hooker Tract', and ran thence South 67 degrees 15′ West, 230 perches, along a marked line, and then prolonged said line to the end of 270 perches, to an anciently bounded white oak, red oak and chestnut stump, pointed out to me by Dorsey L. Ashby, as the beginning of the 'Brannan Land,' which is a part of the said 'Hooker Tract', and believed to be the original beginning of said 'Hooker Tract.'

All this tract, except one line, is laid down by protraction. On this tract Mr. Monroe locates the house of Benjamin Miller, East of the Michler line, and between it and the line running North from the point red "C6," the old State line (See page 1648) and opposite this, on the Maryland side, and covering this Hooker survey, Francis Deakins located quite a number of Military lots adjoining the Maryland old surveys of "Piney Bottom" and

"Small Meadows," and also lying South of Kindness. Mr. Monroe has located the lots touching the old line of this tract on the Maryland side, being lots 345, 342, 343 and 344. It is evident, therefore, that Francis Deakins and the Maryland authorities disregarded the Virginia title under the Hooker patent and located these Military lots upon it up to the line run by Deakins. This line, as at present understood, conforms to the Western boundary of these lots as laid down by Mr. Monroe, and is on the line running due North from point red "C6."

The next tracts located by Mr. Monroe are the patents to Francis and William Deakins for 958 acres and 354 acres, respectively, both dated December 2nd, 1785, being Monroe Exhibits 57 and 58, and found on pages 1851 and 1852 of the Record. These tracts both call to lie on the waters of Snowy Glade Creek Southward of lands claimed by Jesse Ashby. This is manifestly a reference to Jesse Ashby's survey of 400 acres, which has common lines with the Bacorn tract, lying further North, and which Mr. Monroe testifies, on pages 1694 and 1695, were located by him from a cherry tree, which is the beginning point of the Ashby 400 acres; (See patent to Ashby, Record, page 1850.) and is also a corner to the Ashby 400 acres, as shown by Mr. Monroe. This cherry tree was pointed out to Mr. Monroe by either Wesley or William DeBerry, the owners of the land, at that point. His testimony is as follows:

> "671st Q. I will ask you to file with your deposition a certified copy of a patent to Jesse Ashby for 400 acres, dated the .... day of ....., 1784.
>
> A. I will *so* so, marked 'Monroe Ex. No. 56.'
>
> 672nd Q. Is that land as conveyed by that patent indicated on your map, and if so, state how?
>
> A. It is indicated on the map by solid black lines, and enclosing the words 'Jesse Ashby,' and figures '400'.
>
> 673rd Q. What surveys does it adjoin?
>
> A. It adjoins the Bacorn, and the H. White.
>
> 674th Q. Give your reasons for the location of that at the point where it appears?
>
> A. It is laid down from a point beginning at a cherry tree on the north side of a creek, and running east, etc. That point is indicated by red letter and figures 'D 21'. This point as I recollect was shown to me by either Wesley or William DeBerry, and I have forgotten which, as the beginning corner of this tract.

Objection to the location.

675th Q. Are there any common lines between that survey and the Bacorn?

A. There are—two.

676th Q. What are they?

A. The survey of John Bacorn for 500 acres, dated in 1793 has the following calls: north 20 degrees east 40 poles to two cherry trees, corner to Jerry 'Ashley's' land, thence with said Ashley's line east 116 poles to pointers, thence south 308 poles to another of said Ashley's lines to two cherry trees, thence leaving Ashley's line. In the Jesse Ashby survey of 400 acres are the following lines: Beginning at a cherry trees on the north side of the creek and running east 116 poles to pointers, south 308 poles to two cherry trees on the creek.

677th Q. I will ask you to file with your deposition a certified copy of a patent to Frances and William Deakins for 908 acres patented in 1785.?

A. I will do so, marked 'Monroe Ex. No. 57.'

Objection.

678th Q. I will ask you to file with your deposition a certified copy of a patent to Frances and William Deakins for 354 acres dated 1785.

A. I will do so, marked 'Monroe Ex. No. 58.'

Objected to.

679th Q. How are those Deakins tracts of 908 and 354 acres designated on your map?

A. They are designated by the word 'Deakins,' and the figures '908' and '354.'

Fredlock owns a part of this Deakins 908 acres. The Fredlock tract is indicated on the map by the words "Fredlock 210," and Fredlock's house is indicated by a square dot and the word "Fredlock," in smaller letters, between the Michler line and the Monroe line. The deed to Fredlock, which is located, is dated the 28th day of April, 1849, and is from Henry White and wife to Henry Fredlock, recorded in the County Court Clerk's Office of Preston County, found on page 1785 of the Record. Mr. Monroe testifies, with reference to the location of this tract, on pages 1649 and 1650, as follows:

"282nd Q. What further reference lines did you make?

A. At the end of forty six hundred and forty nine and seven tenths poles, I ran a reference line

north sixty one east ten and seventy-five one hundredths poles to a stone pile pointed out to me by Garrett White as his southeast corner, and stated by him to stand in the old state line.

283rd Q. How is that point designated on your map No. 1?

A. It is designated by red letter and figure 'D1.'

284th Q. Was there a fence pointed out to you by Garrett White along there on the Eastern line?

Objected to, because the fence is not located on the plat.

A. I am not certain whether he pointed out a fence or not. There is a fence along there.

285th Q. Is there a fence there.

A. Yes, sir; there is a fence.

286th Q. How did that fence correspond with the stone pile?

A. It agreed with it north and south.

Exception because the witness did not locate the fence

287th Q. What other tract of land did you locate with reference to that corner?

A. I laid down on the plat a tract locally termed as the 'Fredlock' tract, which has a common corner with this point as shown to me by Mr. White.

(By Mr. Sincell):

288th Q. Did he point that corner out to you as the corner of the Fredlock tract?

A. He said that was his corner, and the corner of the Fredlock, the Fredlock place—no one living there on it at the time.

(By Mr. Price):

289th Q. From what did you lay down the Fredlock tract?

A. That tract was laid down from the description of a tract of land which I copied from papers, I think in the hands of Wesley DeBerry, a deed in the hands of Wesley DeBerry.

Exception by counsel for the State of Maryland.

290th Q. Will you file a copy of the paper from which you copied that description with your deposition?

A. I will, marked 'Monroe Ex. No. 11.'

291st Q. What other points did you locate along there? Did you locate any houses?

A. I did. I located a house pointed out to me as the Fredlock house by the following lines, 'Be-

ginning at the end of fourteen and one half miles on our reference line ran south twenty one and three tenths poles, south eighty eight and one-half west twenty seven and two tenths poles to the south east corner of said house. This house is indicated on the map by the word 'Fredlock' and a small square dot."

Mr. Monroe also locates, just North of the Fredlock tract, a tract belonging to Garrett White, indicated by the word "White," in large letters, and he also located White's house, indicated on the map by square dot and the words "G. White." This house is located about half way between the Michler line and the old line, indicated by the red letters and figures "*D½*", "*D1*", "*D2*", "*D6*", etc. He also located a patent for 47 acres granted by Virginia to H. White, designated on his map by the solid black letters enclosing the words "H. White," and figures "47." As to this patent Mr. Monroe testifies from page 1695 to top of page 1696 as follows:

"680th Q. I will ask you also to file with your deposition a certified copy of a patent to Henry White for 47 acres dated in 1852.

A. I will do so, marked 'Monroe Ex. No. 59.'

681st Q. How is it designated on your map?

A By solid black lines enclosing the words 'H. White' and figures '47.'

682nd Q. What reason had you for locating it as you did?

A. This tract is laid down from a corner on the ground pointed out by Garrett White, indicated on the map by *red letter and figure* '*D1.*' The tract marked 'Deakins 354' is located from the Henry White location, which calls for and adjoins this tract, having two lines in common with the same.

Objection to the location as irregular.

683rd Q. Has that White tract any common lines or corners with adjacent surveys? Does it call for any?

A. Yes, sir

684th Q. What are they?

A. It has common lines and corners with the tract called on the plat 'Deakins 354.' The lines common to both these tracts are common in the patent to Henry White as follows: South 16 west 38 poles, crossing said creek to pointers in the Baldwin lines, and with the same reversed south 81 east 40 poles to the beginning. The beginning of the White tract calls for a maple, corner to Baldwin, thence south

1 west 172 poles. Mr. White told me that Israel Baldwin at that time owned the Deakins 354 acre tract.

A copy of this patent is filed as "Exhibit Monroe, No. 59," page 1853. It is dated March 1st, 1852, on a survey made May 4th, 1850. The description contains the following language:

> "A certain tract or parcel of land containing forty-seven acres, lying in Preston County adjoining the lands of Baldwin Vanmeter and the Maryland line and bounded as follows, viz: Beginning at a maple corner to Baldwin now said White's thence with his line S. 1 W. 172 poles to a black haw, thence E. 30 poles to pointers in the Md. line with the same N. 1 E. 214 poles crossing snowy creek to a stone pile, corner to Joseph Thomas, etc."

Mr. Garrett T. White testifies, with reference to these lands, (Record, page 1120) as follows:

He is sixty-one years of age; resides at the point marked "G. White" on the map, where his deposition was taken, near Hutton Station on the B. O. Railroad; that he owns a tract of land taxed to him as 180 acres, but by survey containing 175 acres, adjoining the Maryland boundary line near Hutton, which is the land on which he lives now and has lived since 1858. The Michler line is about thirty rods West of his house. The Monroe line is about twenty or twenty-one rods East of his house; that his land extends Eastward about eight or nine rods beyond the Monroe line, and that he has always recognized his Eastern line as the boundary line between the States. There is a fence along that line about sixty rods in length, which has been there over forty years and his land is cleared up to this fence, and he has had undisputed right to it, having derived title from his father and fifty acres of it from Israel Baldwin. These are West Virginia titles and he has paid taxes upon the lands in Preston County, Virginia and West Virginia, and has never paid any taxes to Maryland. Maryland has not exercised any jurisdiction over it. He has always voted in Preston County. The Bacorn title, owned by Wesley and William DeBerry and others, lies North of him. Wesley owns what is on the South side of the railroad and William DeBerry and Dennis Glover on the North. This Bacorn title is one of the oldest titles. He has heard the surveyors talk about it when he was a little boy,—the George Ashby and the Bacorn titles. The DeBerrys claim the old original line, which corresponds with the line claimed by witness. The house in which he lives was built by

his father, Henry White, in 1847. This land borders on the State line 217 2-5 poles. John A. Connell owns the land on the Maryland side opposite. He claims Westward only to what is termed the old line, the line East of the Monroe line—same line claimed by witness. This line has been generally recognized in the neighborhood as the State line ever since witness has known it.

Similar testimony is given by William H. DeBerry and Wesley DeBerry with reference to the Bacorn title and these White lands and the lots in the village of Hutton, which they have sold off to various people, all claiming the line as a continuation of the line pointed out by Garrett White and indicated on Mr. Monroe's Map No. 1 by the red letters and figures "*D½*", "*D1*", "*D2*", "*D6*", "*D4*", "*D5*", and "*D3.*" This also corresponds with the point marked on Monroe's map by the *black letters "WG" in a red circle* just opposite the Promised Land, in Maryland. This is one of the points located by W. McCulloh Brown, the surveyor on behalf of Maryland. He states that it represents a fence pointed out to him by J. W. Jones, a witness produced on the ground on behalf of the State of Maryland, as being a point in the old line, and shown upon the plats by the *black letters "WG" on Mr. Brown's map.* He gives the latitude and departure at this point from the Potomac Spring, and the perpendicular distance from the Bauer-Michler meridian. He also testifies to this on page 1038.

We also call attention to the testimony of Isaac H. Smith, (Page 1445) and George W. Freeland, (Page 1448) with reference to the line and the possession on both sides of the B. & O. at Huttons. The house of Isaac H. Smith is located on Mr Monroe's map between the Michler line and the *point "D6"* on the old line as located by Mr. Monroe by a square dot and the word "Smith" just North of the B. & O. Railroad. And the house of Freeland is shown just South of the railroad, between the Monroe line and the old line, and considerably East of the Michler line, and just near it is the Felton house with the word "Felton" and a square dot. These witnesses all testify to the line as represented by the red letters and figures "*D1*", "*D2*", "*D6*", "*D4*", "*WG*" *and* "*D5.*" We have already been showing that that portion of the Maryland tract called "Kindness" is covered by Virginia patents, and given the testimony as to the location of the Bacorn and Deakins tracts, ante, page————. Mr.

Monroe's testimony as to the location of these tracts is found on pages 1650 to 1655, as follows:

"The Witness: I also located Garrett White's house with the following reference line. Beginning at the end of forty seven hundred and sixty four poles on our reference line, I ran north sixty one and one half west twenty five and forty eight hundredths poles to the southeast corner of said house. This house is indicated on the map by the words 'G. White' and a small square dot.

Excepted to because there is no reference line located on the plat.

292nd Q. Going farther north, I see a representation of a railroad there. What railroad is that?

A. Baltimore & Ohio railroad?

293rd Q. What points, if any, did you locate on or near the Baltimore & Ohio railroad?

A. At the end of four thousand eight hundred and eighty nine poles and three tenths poles on our reference line, I ran north fifty-four and forty seven west seventy and nine tenths poles to a stone monument standing on the south side of the B. & O. railroad, said to stand in the Miehler line.

294th Q. How is that represented on your map?

A. That is represented by the word 'Monument' and a small square on the line representing the Miehler line on said map. The reference stake from which this was located is indicated on the map by a small circle with the figures '4889.3' opposite. At the end of four thousand nine hundred and eleven and four tenths poles, on our reference line, I ran south eight seven east three and seventy five hundredths poles to the southwest corner of S. Freeland's house. This point is indicated on the map by the word 'Freeland' and a small square dot.

Excepted to because the refernce line is not located.

295th Q. Was that Freeland house east or west of the reference line run by you?

A. East. From this same point I ran north fifty three degrees and forty five minutes west twelve and twenty-eight hundredths poles to the northeast corner of E. W. Felton's house. This point is represented on the map by the word 'Felton,' and a small square dot.

Excepted to because there is no reference line located on the plat.

The Witness: At the end of forty nine hundred and nineteen and twenty-four hundredths poles, I crossed the Baltimore & Ohio railroad.

296th Q Before you left the Garrett T. White, were you pointed out his division line northward?

A. Yes, sir

297th Q. Where is that indicated on your map?

A. At the end of forty eight hundred and seventy and five tenths poles, crossed the division line between DeBerry and Mr. White, as pointed out by him —Wesley DeBerry, I think it was; I am not sure; I think it was—about one pole east of a cherry tree marked as a center line. This point is indicated on the map by the *red letter and figure 'D2.'*

298th Q. What information did you have at that point as to the tract of land lying north of the land of Garrett White?

Excepted to as leading.

A. Mr. White stated that Mr. DeBerry's land immediately adjoining him on the north was a part of a tract of land originally granted to John Bacorn by the State of Virginia.

299th Q. Going northward, did you find anything to indicate a corner on the Bacorn tract, and if so, what and where?

A. I did. Having the data in my possession relative to the Bacorn tract, which described the eastern line of that tract as being six hundred poles long. At that distance north of the division line between said White and this tract, I set a reference stake, at the end of five thousand four hundred and seventy poles on our reference line, and ran from that south fifty two and three fourths east eight and eight tenths poles to a stone pile in a glade and thorn thicket, which had the appearance of having been built a great many years—was deeply covered with brush and leaves and entirely out of sight at first, which I took to represent the northern corner of the Bacorn tract. This point is indicated on the map by *red letter and figure 'D3'*.

Exception by counsel for the State of Maryland.

The Witness: I had further reason to believe that I should find a corner of this tract at this point, as I had in my possession title papers of William DeBerry covering the land which was claimed to be a part of this survey and which recited certain calls indicating that the north east corner of this tract would be at this point.

300th Q. Will you file with your deposition, if

you have it, a copy of the paper to which you refer?

Objected to by counsel for the State of Maryland.

A. I will It is a deed from Eliza Holmes and others to James Brown, dated November 11th, 1875, and recorded in Book 43, page 279, of the records of Preston county. It is marked 'Monroe Ex. No. 12.'

301st Q. Did you then or at any time run any of the lines of the Bacorn tract?

A. I subsequently ran the western line of this tract, but did not run the line from that point, from the point, from the stone pile westward.

302nd Q. As laid down on your map, does the Bacorn extend from the stone pile at the point D3 to the lands of Garrett White?

A. It does, and apparently overlaps it a little. This was protracted from the point at the stone pile D3 The error in the lines is shown on the map by the lap The line on the ground is a continuous line, east line of that tract, Garrett White, while it appears from the map to be a little offset.

Exception by counsel for the State of Maryland to the question and answer.

303rd Q. What is the southern point of this Bacorn tract on its eastern side—that is, its south eastern corner. Where is it on the map?

A. It lies perhaps six or eight rods east of the point designated *on the map as D2.*

Exception by counsel for the State of Maryland to that evidence of location, because it is too indefinite, and it does not appear upon the plat.

304th Q. Is it near the words 'Snowy Glade'? Is it that part indicated on the map near the point marked 'Snowey glade?'

Exception by counsel for the State of Maryland to the question on the ground that it is leading.

A. It is.

305th Q. Taking that eastern line of the Bacorn tract as you have located it, how does it compare with the eastern line of the White and Fredlock properties, as you located them?

A. , It is in the same line.

306th Q. Exactly?

A. Yes, as I stated before, that tract is laid down by protraction there, and it should be one and the same line. A little error in protraction shows on the map, whereas in fact, it is one straight line.

307th Q. Where is that eastern line of the Bacorn

tract as laid down by you with reference to the house of George Freeland?

A. S. Freeland, isn't it? It is east of that house.

308th Q. How far east?

—. I did not measure it at that point. The fence along there is right close along by the house, the east side.

309th Q. Where is that fence? Where does it run?

A. It was at that time a fence extending at least a part of the way through the fields southward from that point, and northward along that line as indicated on the map as far as the south east corner of the tract of land marked 'Dennis Glover 100.'

Objected to by counsel for the State of Maryland, because there is no fence located upon the plat, and it was not located upon the ground.

310th Q. There was a fence then, do I understand you, from Freeland's and south of Freeland's extending northward as far as the point indicated by the Dennis Glover tract on the ground?

Objected to by counsel for the State of Maryland.

A. Yes, sir; at least a part of the way.

311th Q. How was that fence on the ground as compared with the line shown on your map as the eastern line of the Bacorn tract?

Excepted to on the ground that the fence is not located upon the plat, nor was it located upon the ground.

A. Substantially the same.

312th Q. How do you know that?

A. At the end of four thousand, nine hundred and forty seven and two tenths poles, I ran south seventy four and one fourth east six and four tenths poles to a board fence running north and south. At the end of five thousand and twenty one and four tenths poles I crossed a division fence between what was then called the Gates and Sharp land, and William DeBerry land seven and six tenths poles west of a stone planted and at the intersection of a fence running north and south. That stone is marked 'W. D.'—standing at the interscetion of a fence running east and west with a fence running north and south.

Objection to the answer unless the fence is located on the plat.

313th Q. Where is that point located on the map?

A. This point is indicated on the map, by the *red letter and figure D4.* At the end of five thousand, two hundred and four and seven tenths poles, I ran north eighty five east seven and ninety five hundredths poles to a planted stone in a fence running north and south, which was pointed out to me by either Dennis Glover or William DeBerry, I cannot recall which, as the south east corner of Dennis Glover's one hundred acre tract, and which was claimed to stand in the old state line. This point is indicated on the map by the red letter and figure 'D5.'

Exception to the answer because the fence is not located.

314th Q. Where is the point to which you ran a reference line south seventy four and one fourth east six and four tenths poles to corner of a board fence, about which you have heretofore spoken?

A. This point is indicated on the map by red letter 'D6.'

315th Q. Did you locate any other house near or on the Baltimore & Ohio Railroad from there?

A. I did, at the end of four thousand, nine hundred and thirty nine poles on our reference line I ran south eighty one and one half west seventeen poles to the south west corner of Smith's house. I do not know his first name—do not recollect it.

316th Q. Was it Isaac H. Smith, who was examined afterward as a witness in this case?

A. Yes, sir, he was examined as a witness afterward. I presume that is the man's name.

317th Q. How is that house indicated on the map?

A. This house is indicated on the map by the word 'Smith', and the small square dot.

318th Q. How is it with reference to the Baltimore & Ohio Railroad?

A. North of the Baltimore & Ohio Railroad. I also located by triangulation William DeBerry's house.

319th Q. Where is that indicated on the map and how?

A. By the word 'DeBerry,' and a small square dot.

Q. Where is that with reference to the Oakland road?

A. North of the Oakland road.

Q. I see you have laid down on the map a tract indicated as 'Dennis Glover 100'. From what did you lay that down?

A. I laid that down from the calls of a deed in possession of Mr. Glover from the point on the map indicated by the red letter D figure 5, as shown on his south east corner by either Mr. Glover or Mr. DeBerry. I cannot recall which.

320th Q. Will you file a copy of that deed with your deposition.

A. I will, marked 'Monroe Ex. 13.'

321st Q. I notice on your map a tract of land called 'Kindness'. What have you to say with reference to its location, and whether its location is correctly indicated on the map?

322nd A. This tract of land is laid down from the data on Mr. Brown's map, and from surveys made by him, and is substantially correct, except that it shows the lines of 'Thomas & Ann' 'The Promised Land' and the 'Kindness' to have common lines, whereas, it is laid down on Mr. Brown's map as having a common corner at the point indicated on Mr. Brown's map at black 'C', and which point is indicated on Map No. 1, as black 'C', but showing on Mr. Brown's map a very narrow strip beween the tract called 'Thomas & Ann' and 'Kindness', as well as between 'Thomas & Ann' and the 'Promised Land.'

323rd Q. Did you run out these tracts on the ground?

A. I did not.

324th Q. Were you with Mr. Brown when he did any surveying with reference to these tracts?

A. I was.

325th Q. He gives an account of that surveying, does he, in his testimony and report?

A. Yes, sir.

Q. I read you the description of Military Lot number twelve hundred and thirty seven: Beginning at the end of three hundred and twenty seven perches on the third line of a tract of land called 'Thomas & Ann,' surveyed for Thomas Johnson, Esq., and running south twenty eight degrees west two hundred and four perches, north one hundred and eighty-two perches, then by a straight line to the beginning, containing fifty acres, and I will ask you whether you have laid down that lot number twelve hundred and thirty seven on your map No. 1?

A. I have.

326th Q. Where did you locate it with reference to the tract 'Thomas & Ann'?

A. It is located substantially in conformity with that description, at the end of three hundred and twenty seven perches, on the third line. Well, I believe that the corner of that lot is held now a little farther southward on the line, as indicated by the fence. The location of lot number twelve hundred and thirty seven is substantially the same as that shown on Mr. Brown's map in this case.

327th Q. The lots twelve hundred and thirty eight, twelve hundred and thirty nine, twelve hundred and forty one, twelve hundred and forty-three and twelve hundred and forty five, which appears on your map No. 1,—were they surveyed, any of them?

A. None of these lots were run. They were laid down by protraction from lot twelve hundred and thirty seven. Tie or reference lines were run to corners along our reference line which we supposed to be corners of these lots by their agreements with the distances as described in the calls of those lots.

Excepted to because there are no tie lines located on the plat.

328th Q. Just give those lines that were run, and what you found there?

A. At the end of five thousand six hundred and seventy six poles on our reference line, I ran south seventy three, thirty five east six and eighty eight hundredths poles to a stake and stone pile, thought to be a corner of lots twelve hundred and thirty-seven and twelve hundred and thirty eight. This point is indicated on the map by red letter and figure 'D7.' At the end of five thousand seven hundred and fifty four poles, I ran south seventy-two degrees east six and twenty four hundredths poles to a stake and stone pile thought to be a corner of military lots twelve hundred and thirty eight and twelve hundred and thirty nine. This point is indicated on the map by the red letter and figure D8."

Mr. Monroe shows by this testimony the location of the Maryland tracts "Promised Land" and "Thomas & Anne" and "Kindness" with reference to each other, and lays down the Military Lots Nos. 1237, 1238, 1239, 1241, 1243 and 1245 in accordance with his location of these Maryland tracts, especially the Thomas & Anne.

Military Lot 1237 is described as follows:

> "Beginning at the end of three hundred and twenty seven perches on the third line of a tract of Land called Thomas and Ann survey for Thomas Johnson, Esquire, and Running South twenty eight degrees West two hundred and four perches North one hundred and Eighty two perches Then by a Straight Line to the beginning Containing fifty acres."

And Lot No. 1238 calls for the end of the second line of Lot 1237 and the other lots call for each other respectively; all being located with reference to this tract, Thomas & Anne. And these locations make a continuous line extending from "*D½*" through "*D1*", "*D2*", "*D6*", "*D4*", "*WG*", "*D5*", "*D3*", "*D9*", "*D7*", "*D8*", "*D11*", "*D17*" and "*D16*" to the old Burchinal Road, and on North; the Virginia grants along this line all conforming to and calling for this old line, and the citizens holding up to it. As shown by Mr. Monroe's testimony, he located the tract of U. N. Orr for 505 acres. Mr. Monroe files with his deposition the deed to James Brown, who is prior in title to William DeBerry, from Eliza Holme, dated November 11th, 1875 (Record, page 1787). This calls to run with the Maryland line North 60 poles to a stake in the Glade; also deed from Edward Long to Dennis Glover—' Monroe Exhibit No. 13," dated October 16th, 1882; *calls to begin at a stake in the Maryland line, and runs with the line 200 poles.* This is an Eastern part of the Bacorn tract, as located by Mr. Monroe.

Mr. U. N. Orr's deposition is taken in 1896, found on pages 1518 and 1519. He testifies that he is sixty-four years old and owns 1647 acres, adjoining the boundary line between Maryland and West Virginia. He says that it is right East of Terra Alta, and was *surveyed to the old Maryland line.* He purchased it from the administrators of Ulysis Ward—350 acres in 1871, and the remainder in 1878. He thinks it is a part of the original tract of 6000 acres; knows where the Michler line runs through the property, and that there is a full quarter of a mile, he thinks, between the two lines—the Michler and the old line. Every acre of his land has been assessed and taxes paid on it in Preston County since he purchased it, and it has always been assessed for taxes in Preston County. His deeds are found on pages 1552 and 1554, being Exhibits 23 and 24.

On page 1554, in describing lot No. 1, the deed is as follows:

"Thence E. 310 poles *to the original boundary line of the State of Maryland and Virginia*, thence *with said line* N 1¼ E. *300 poles* to a white oak marked H, and pointers, &c."

And on page 1555, in describing lot No. 2, his deed contains this language:

"Also Lot No. 2 of said survey, and bounded as follows: Beginning at a chestnut the second corner to the above 495 acres and 190 acres of David Freeland's aforesaid and running thence E. 310 poles *to the States of Virginia and Maryland boundary line, thence with the said line S. 1¼ W. 93 poles to a 'planted stone' believed to be the 45th corner on the original Md. line* of the original survey of 6000 acres of which this is a portion."

And in describng lot No. 9, it contains this language:

"Beginning at a *white oak marked 'H' on Md. State line* and corner to Lot 1, running with said State line N. 1 E. 60 poles, thence W. 550 poles &c."

So that this Orr land extends 453 poles along this old line. And Mr. Monroe shows that he located these lands with reference to the original Deakins patent of 6000 acres, and found on the ground this white oak marked "H" called for in Mr. Orr's deeds. It is indicated on his map No. 1 by red "*D11*". (Record, page 1656) This *point "D11"* is the same line with the other points to which we have just called attention, and corresponds with the Western line of Military Lot 1241. See his testimony, pages 1655, 1656 and 1657, as follows:

"329th Q. I hand you a copy of a patent from the Commonwealth of Virginia to Frances and William Deakins of six thousand acres, dated September 22nd, 1789, a copy of which is filed with the answer in this cause, and I will ask you whether you attempted to locate that patent, and if so, how?

A. I did At the end of fifty four hundred and eighty eight and eight tenths poles on my reference line I ran south eighty eight and three fourths east seven and three tenths poles to a white oak believed to stand at the end of the forty-fifth line of the Deakins six thousand acre survey. This portion of the land was at this time owned by Major U. N. Orr, as well as one or two other lots indicated on the map by the words 'U. N. Orr, 350.' and 'U. N. Orr 380.' This point agrees substantially with the southern corner of lot twelve hundred and thirty seven,

as indicated on the ground by the surveys of Mr. Brown and myself, and as indicated on the map by red letter and figure 'D9.' This land was subsequently purchased by Parley DeBerry, from Major U. N. Orr, and this point was pointed out to me by DeBerry as his corner, and I subsequently ran from this point by the calls of the original Deakins patent south twenty eight west seventy poles to a stone pile at the corner of the fence claimed by DeBerry as his corner, and as a corner of the Deakins six thousand acre tract. This point is indicated on the map by the red letter and figure D10. While running the reference line in this case at the end of fifty eight hundred and fifty four poles, I ran north seventy one and three fourths east five and one tenth poles to a white oak marked with the letter 'H' on the east side, and also marked as a side line on the east side. This white oak I took to be the same tree called for in the deed of Major Orr from the Ward heirs, as a white oak corner or described as a white oak corner marked with the letter 'H' standing on the old Maryland line.

330th Q. Indicate that on the map?

A. This point is indicated on the map by *red letter and figure 'D11.'*

Exception to the answer, by counsel for the State of Maryland.

330th Q. I show you a certified copy of a deed from the executors of Ulyssis Ward to Uriah N. Orr, dated April 28th, eighteen hundred and seventy-seven, and filed with the deposition of U. N. Orr heretofore taken in this cause as 'Ex. No. 24,' and I will ask you whether that is the deed you referred to in your last answer.

A. It is.

331st Q. What is the language of that deed with reference to the tree marked 'H.' Please read it.

A. That portion of the deed referring to this tree reads, 'Thence east three hundred and ten poles to the original boundary line of the States of Maryland and Virginia, thence with said line north one and one fourth degrees east three hundred poles to a white oak marked 'H' and pointers, thence west two hundred and fifty poles,' etc. This deed describes the parcel marked 'U. N. Orr 495' as laid down on the map.

332nd Q. I notice that in the description of the six thousand acres in the original patent, copy of which has been filed, there is a call as follows:

'Thence north ten and one half east forty one poles to the sixth line of a tract of land called 'Thomas & Ann,' and with it reversed the four following courses: north seventy six west forty poles, north twelve and one half east two hundred and seventeen poles, north eighty two east one hundred and sixty nine poles, north twenty eight east seventy poles.' Will you indicate on your map the point in the tract called 'Thomas & Ann' called for in the above lines I have read.

A. This point is indicated on the map by red letter and figures 'D12.'

333rd Q. Where is the point at the end of the four courses I have just read, north twenty eight east seventy poles?

A. This point is indicated on the map by red letter and figure 'D9.'

334th Q. The next call in the patent is north six hundred and seventy five poles to Albert Gallatin survey. What line indicates that on your map?

A. The end of that line is indicated by red letter and figure D13.

335th Q. The line then runs from what point to what point as indicated on your map?

A. From the point indicated on the map by the red letter and figure D9 to the red letter and figures D13.

336th Q. The next line reads: 'And with it'—that is, with Albert Gallatin's survey 'west five hundred and ninety poles to a tract of land patented in Maryland called 'Nonpariel.' Will you indicate the end of that five hundred and ninety pole line on your map?

A. This point is indicated on the map by red letter and figures 'D14.'

337th Q. How does that correspond with the location of the 'Nonpariel' tract, as you have indicated it on your map?

A. It compares with the description—that is, the Nonpariel tract is located on my map to conform to that description.

338th Q. The Nonpariel tract is also located on Mr. Brown's map, is it not?

A. It is.

339th Q. How does the location on your map compare with the location on Mr. Brown's map of that tract Nonpariel?

A. Substantially the same.

340th Q. Will you look at 'Ex. No. 23,' filed

with the deposition of U. N. Orr in this cause, being a certified copy of a deed from the executors of Ulyssis Ward, deceased, to Uriah N. Orr, dated October 12th, 1872, and state whether that deed is represented on your map, and if so, in what way?

A. This tract of land is laid down on map No. 1 partially in broken and partially in solid lines, and with the words 'U. N. Orr' and the figures '380' within said lines."

Mr. Brown located this 6000 acres, as shown by his report, page 967 of the Record. His special purpose in locating this tract was to find a way to locate the old obsolete Maryland patent of Nonpariel. His location, Mr. Monroe testifies, is substantially the same Monroe's location. Mr. Monroe says, at the bottom of page 1655, speaking of the point "H," which is the same thing as "D9": "This point agrees substantially with the Southern corner of lot 1237, as indicated on the ground by the surveys of Mr. Brown and myself and as indicated on the map by red letter and figure "D9."

Mr. Monroe next locates the tract of land known as the Honore Martin and John Hoye 3600 acres. This is located between the points "*D13*" and "*F1*" on the old line, and covers a great part of the land between the old line and the Michler line for a distance of more than four miles. The manner in which this is located is described by Mr. Monroe in his testimony, on pages 1567 to 1658. This 6000 acres was, as heretofore explained, forfeited for non-entry, and was sold and conveyed by William Seigler, Commissioner of delinquent and forfeited lands for Preston County, Virginia, to John Hoye, March 30th, 1836. (See Monroe Exhibit 15, page 1791 of the Record.) And a part of it was afterwards conveyed by John Hoye to Jacob Crane, which is the part marked "John Hoye to Jacob Crane 1247" on the map. Mr. Monroe shows how this was located, by his testimony on page 1659. Going North along the Eastern line of this 3600 acre tract, Mr. Monroe located a red oak tree, marked on the North and South sides, which is indicated on the map by *red "E1."* And further North, on the same line, Mr. Brown located a cherry tree pointed out to him by Samuel Teets, a witness produced on the ground on behalf of the State of Maryland, as being a point in the old line. This is indicated on Monroe's map by black letters "WI" in a red circle. Mr. Brown gives this point as 1547 feet from the Michler line. Mr. Monroe has

also located within the lines of this 3600 acres, patent to John Rodeheaver for 297 acres, filed in the cause as "Monroe Ex. No. 55" (Record, page 1849.) It is dated August 31st, 1836, on a survey made May 13th, 1833. Mr. Monroe's testimony as to the location of this tract, found on page 1694 is as follows:

> "667th Q. I will ask you to file with your deposition a certified copy of a patent to John Rodeheaver for 297 acres, dated in 1836.
>
> A. I will do so, marked 'Monroe Ex. No. 55.'
>
> 668th Q. If you have located that patent on your map, please state how it is designated?
>
> A. Designated by solid lines enclosing the name, 'John Rodeheaver' and the figures '297.'
>
> 669th Q. Why did you locate that Rodeheaver survey as you have?
>
> A. This is located from a white oak stump, standing on White Oak Spring Run, where the Burchinal road crosses, pointed out to me as the beginning corner of this tract, as I recollect by Mr. Metheny.
>
> 670th Q. Who is he?
>
> A. A man who lives there close. It is a well known corner in that country. Everybody knows that. I do not remember the man's name now. This white oak stump is indicated on the map by red letter and figures 'D20.'

Going North to the Diadem tract, we have already given the several tracts of land located on the territory covered by the Diadem, but the evidence shows clearly that the old Maryland line, through the Diadem is recognized as practically in the same line as that heretofore indicated by red "*D13*", "*D18*", "*E1*" and "*F1*." Mr. Monroe shows, page 1661, that his location of the Diadem is substantially the same as Mr. Brown's, and that from the point marked red "F3," being a stone in Mike Feathers' field, he ran a reference line to a point which was pointed out to him by Frankhouser, as the Southwest corner of lot 1402—red "F10" on map No. 1. And from this point he located lots 1402, 1400, 1298, 1296, &c; and he says that his location of these lots corresponds substantially with their location with reference to the Diadem tract as shown on the map of Francis Deakins. We have already given the testimony of Michael E. Feathers, J. W. Feathers, Ethbell Falkenstein and J. Z. Feathers in the printed Record, on pages 1457 to 1468, inclusive, (See ante, page ———) which proves that the old line was East of Michael

Feathers' house a considerable distance, and also Falkenstein's. Both of these places are indicated on the maps as between the Michler line and the Monroe line. From the point just North of red "*F1*" there is an offset to the East in the old line as claimed, corresponding practically with the point *black* "*WK*", *with a circle*," as indicated on Monroe's map No. 1, and *black* "*WK*" on Mr. Brown's map. This point "*WK*" is a point where a red oak formerly stood, pointed out to Mr. Brown by Ethbell Falkenstein, a witness produced on the ground on behalf of the State of Maryland, as a point in the old line. (See his report, page 949.)

Mr. Monroe next locates on his map, Maryland Military lots Nos. 1463, 1462, 1461 and 1460 North of the Diadem. Mr. Brown also, on his map, locates lots Nos. 1463 and 1462. His locations correspond substantially with the location on Mr. Monroe's map No. 1. The location of these lots on Mr. Brown's map No. 1 also correspond with their location on Deakins map, so far as the tract Diadem is concerned, but Mr. Monroe testifies (Page 1634) that these lots are farther East than the lots South of the Diadem, 1402, 1400 &c. There appears to be a small vacant strip between the old State line and this row of lots 1463, 1462, 1461 and 1460 about twenty rods wide. He further testifies that if these lots 1460, 1461, 1462 and 1463 were placed as to their Western boundary on the same line as 1402, 1400 &c, their Western boundary would be practically on the old State line, as pointed out to him.

The next large tract located by Mr. Monroe is the Henry Banks 8000 acre survey. This is located from a certified copy of a survey and sub-division made of this tract by Reuben Morris, and this tract is laid down substantially as located on Reuben Morris' map, with the exception of the southern line, which is laid down to conform to the stone corner pointed out by Notley Browning. This Henry Banks patent is filed as "Monroe Exhibit No. 26", and found on page 1806 of the Record. It is dated July 27th, 1805, on a survey made October 24th, 1799. The map of Reuben Morris has heretofore been referred to and is "Monroe Exhibit No. 24," between pages 1804 and 1805 of the Record. Reuben Morris was assistant surveyor of Preston County and did a great deal of surveying in Preston. He was dead when these depositions were taken, ten or fifteen years. This patent calls, among other lines, to run with or near Col. McClery's lines 784 poles, crossing Pine

Swamp run and some other drains to *five white oaks in the Maryland line,* and with it N 1780 to a double chestnut by the new road &c. Mr. Monroe testifies, on page 1670, that this point, where the white oaks in the Maryland line are called for, is indicated on his map by *red "F1"*. It will be noticed that this is just immediately North and close to the *red oak at "WK"*, which Falkenstein pointed out to Mr. Brown as in the old Maryland line. This, Mr. Monroe says, is the same point that was pointed out to him by Notley Browning as the corner of this tract. The Northeastern corner of this 8000 acre tract, being the end of the line running North 1780 poles with the Maryland line, is indicated on the map by *red "GI"* just South of the Cherry Hill tract. The Eastern line of this 8000 acre patent is recognized as the State line until we get as far North as the Henry Deahl patent of 367 acres, lying on the Northern end of the Elder Spring tract. This Deahl patent extends further East, and from its Southeastern corner there is a set-off in the line as recognized and held to in that section, corresponding with the Eastern line of this Henry Deahl, the Jesse Spurgin, the Isaac James 220 acres and the Western line of the Maryland Whipperwill tract. On this tract is the piece of land owned by J. A. Reckard, and his house is located on the map at the point red "F9". Amanda J. Reckard, wife of John A. Reckard, testified in this case in 1896. Her testimony is found on page 1469 of the Record, and she produced his deed from Jonas DeBerry and wife, dated December 17th, 1880, recorded in Preston County Clerk's Office. (Record, page 1535). The description is as follows:

> "Beginning at a *stone pile in the old Maryland line* 169 poles N. of the two pitch pines standing 16½ poles N. of White Rock Run; thence N. 106 poles to a stake and stone pile thence W. 151 poles to the new Maryland line at a rock and pointers with said line S. 106 poles to a stone pile thence E. 151 poles to the beginning containing one hundred acres be the same more or less, being the same land conveyed by N. H. Browning and wife to said Grantors by deed bearing date March 10th 1876."

It will be seen that this conveys a piece of land between the Michler and old Maryland line, and, according to this deed, these lines are 151 poles apart at that place. Mrs. Reckard testifies that they had lived on that piece of land for twenty years. It

had always been assessed for taxes in West Virginia; that her husband paid his taxes and voted and their children went to school in West Virginia.

In connection with the discussion in regard to the Elder Spring tract and the surrounding patents, we have shown how these lands are held under junior patents within this Banks 8000 acres. We have already examined the testimony as to the location of the old line through the Cherry Hill tract and have shown the holdings of Mr. Teets, Sylvanus Fike and others, and also the Western line of the Whipperwill Maryland tract, covering the Eastern part of the Cherry Hill tract. The beginning corner of the Jesse Spurgin 248 acre tract is a chestnut 8 poles North from the beginning corner of Spurgin's Maryland Whipperwill survey. The beginning corner of this 248 acre tract is indicated on the map by *red "G10."* (See Monroe's testimony, page 1677.) The Whipperwill tract calls to begin at a bounded Spanish oak tree standing on a line said to divide the State of Maryland from the State of Virginia, and about one-half mile Westward of James' dwelling house. Mr. Monroe, in his testimony, from page 1677 to the bottom of page 1680, explains the location of these several tracts with reference to each other, and with reference to the Maryland line, as follows:

> "518th Q. Where is that beginning corner indicated on your map?
>
> A. The beginning of the Jesse Spurgin 240 acre tract is indicated on the map by *red letter G, figure 10.*
>
> 519th Q. This survey calls to run from that beginning corner south 204 poles to a stone pile, then south 77 west 84 poles to a chestnut oak, corner to Henry Deal's first survey, also the second corner to the survey made for Ryner. What point is indicated on your map for the end of that line south 204 poles?
>
> A. That point is indicated on the map by red letter and figure *'G11.'*
>
> 520th Q. Is that a corner of the Henry Deal survey on your map?
>
> A. No, sir; it is the next corner that runs from there.
>
> 521st Q. The next call is south 77 west 84 poles to a chestnut oak corner to Henry Deal's first survey. Where is that point on your map?
>
> A. This point is indicated on the map by red

letter and figures 'G 12'.

522nd Q. What Henry Deal survey is that point a corner of as shown on your map?

A. The corner of the Henry Deal 367 acres.

523rd Q. Is that his first survey as compared to the two you have down?

A. It is.

524th Q. Has this Spurgin tract of 240 acres common line with the Henry Deal 387?

A. It has one common line with that tract.

525th Q. What line is it?

A. The line described in the Henry Deal 367 acre survey as running north 50 west 160 poles to a chestnut conforms practically to a line in the Jesse Spurgin survey of 240 acres, which calls from a chestnut oak, corner to Henry Deal's first survey, and also second corner to the survey made for Ryner, thence north 50 west 156 poles to a chestnut near the head of a drain, corner to said Deal.

526th Q. I believe you stated that the Henry Deal 367 acres calls for and runs with the Elder Spring tract?

A. I did.

527th Q. And the Jesse Spurgin 240 calls for and runs with the Henry Deal 367 acre tract?

A. It does.

528th Q. I notice certain military lots, numbers 2954, 2957, 2958, north of the eastern part of the Cherry Hill tract. How did you locate those tracts on the map?

A. These tracts are located by protraction with reference to the Cherry Hill tract. Lot 2954 calls to begin at the end of 50 perches, on the fifth line of the Cherry Hill, etc. Lot 2957 calls to begin at the end of the second line of lot 2954. Lot 2958 is laid down by protraction from the Deakins map.

529th Q. Are those lots shown upon the Deakins map?

A. They are.

530th Q. How does their location on that map in relation to the Cherry Hill tract correspond with the way you have located them?

A. Practically correspond, except the closing line of lot 2954 does not correspond with the lines of the tract called Cherry Hill.

531st Q. I call your attention to Exhibit No. 16 filed with the depositions, being a certified copy of a deed from Jesse Spurgin and wife to Andrew Teets,

dated April 27th, 1855, for 240 acres. I will ask you whether that described any of the lands about which you have testified.

A. It describes the tract of land marked on the map as 'Jesse Spurgin 240.'

Q. From the description, what is your opinion as to whether it conveys the whole of the 240 acres granted to Jesse Spurgin by the patent dated April 21st, 1857?

Objection.

A. In my judgment, it does.

533rd Q. In courses and distances?

A. The courses and distances agree with the patent made to Jesse Spurgin for 240 acres, with the exception of two bearings, which appear to be transposed in the copy, reading north 62 west 68 poles, instead of north 52 west 68 poles, and north 52 east 19 poles instead of north 62 east 19 poles.

534th Q. They both call to begin at a chestnut eight poles north of the beginning corner of Whipperwill, don't they?

A. They do.

535th Q. I show you exhibit No. 10, being certified copy of a deed from Andrew Teets and wife to George W. Teets, dated June 26th, 1869. I will ask you from the description of the land conveyed by that deed, whether you can identify it as any part of the land about which you have testified.

Excepted to.

A. I can. This tract appears to be the southeastern portion of the original 240 acres.

Excepted to.

536th Q. Is it indicated in any way on the map?

A. It is, by the words 'Teets 82', enclosed by a dotted line.

537th Q. I show you Exhibit No. 15, being a certified copy of a deed from John Taylor and wife to Sylvanus Fike, dated March 25th, 1893, and will ask you whether that describes any part of that land?

A. It does. That portion of the land indicated on the map by the words 'Sylvanus Fike 48', and is the eastern portion of the Jesse Spurgin 240 acre tract —or rather the north eastern portion, I suppose.

Exception to the answer..

538th Q. I show you Exhibit No. 17 heretofore filed with the deposition in this cause, being a certified copy of a deed from John Taylor and wife to Joshua Fike, dated April 8th, 1890. I will ask you if you can identify the land conveyed by that, by anything on your map?

A. I can. This is indicated on the map by the words, 'Joshua Fike', and the figures '53', enclosed by broken lines, and it lies in the southern portion of the Jesse Spurgin 240 acre tract.

Excepted to.

539th Q. Did you take any references to the houses of any of the people living on that Jesse Spurgin tract of land?

A. At the end of 10160 poles, I passed about 35 poles east of Joshua Fike's house. This house is indicated on the map by a square dot opposite the figures '53' and below the word 'Fike'.

540th Q. Is he east or west of the Michler line?

A. He is East of the Michler line.

Excepted to.

The Witness: At the end of 9,920 poles on this reference line we passed about 25 poles east of Amanda Hull's house. This house is indicated on the map by the words 'Amanda Hull' and a small square dot.

541st Q. I hand you a copy of a patent from the Commonwealth of Virginia to Isaac James for 220 acres, dated November 28th, 1839, a certified copy of which is filed with the defendant's answer in this cause as defendant's exhibit No. 10, and I will ask you if that land granted by that patent is represented on your map?

A. It is represented by solid black lines enclosing the words 'Isaac James' and figures '220.'

543rd Q. How did you locate that on your map?

A. At the end of 10,469.9 poles on our line, I ran a reference line north 58 degrees 48 minutes east 30 poles to a chestnut snag, which as I recollect. was pointed out to me by Joseph Guthrie as a corner to his tract, and the Isaac James tract. This tract is laid down to conform to this reference line. The point at which this chestnut snag stood is indi-

cated on the map by the red letter and figure 'H1'.

544th Q. This patent calls to run south 67 east 182 poles to a stake in the state line, and with the same north 295 poles to the beginning, having called to begin at a black oak in the state line. Will you indicate on the map the beginning corner of that survey, as you have located it.

Exeepted to.

A. The beginning corner of this survey is indicated on the map by *red letter and figure 'H2.'*

545th Q. And the point where the state line is intersected begun at the end of the course south 67 east 182 poles. Where is that on the map?

A. That is indicated by the red letter and figure 'G11'.

546th Q. Does that corner correspond with the corner of any other survey?

A. No. It falls a few rods south of the point 'G10.'

547th Q. Did you run any third reference line in connection with that Isaac James land?

A. At the end of 10,469.9 poles I ran a line south 71, 10 east 96.9 poles to a point in the line between Thomas and Evans. Evans now owns the James tract. This point was in a lane, as I recollect, and was pointed to me by Alex Thomas as a point in the old state line. This point is indicated on the map by red letter and figure 'H 3.' "

In locating the Isaac James patent for 220 acres, it calls to run S. 67 E. 182 poles to a stake in the State line, and with the same North 295 poles to the beginning"; the beginning being a black oak in the State line. Mr. Monroe's testimony, on page 1680, is that the beginning corner of this survey is indicated on his map by *red "H2"*, which is in a line practically with *"G10"* and *"G11,"* they being the Eastern boundary of the Teets and Fike lands, and *"G10"* being the Southeastern corner of the Isaac James 220 acres. Mr. Monroe also located a point in a lane in the old State line, which was shown him by Alex Thomas. This is indicated on the map by red *"H3,"* and corresponds with the point located by Mr. Brown as *"WL"* in the Granary, Mr. Brown's location of the Granary being entirely different from that made by Mr. Monroe. Mr. Brown says that this is a fence pointed out to him by Isaac Meyers, a witness produced on the ground on behalf of the State of Maryland, as being a point in

the old line shown upon his plat by the *black letters "WL."* (See page 949 of the Record.)

This patent is found on page 484 and is dated November 28th, 1839. The description is as follows:

> "A certain Tract or parcel of Land, containing 220 Acres, situated in Preston County *along the Maryland Line*, bounded as follows—Beginning at *a black oak in said line*, and the beginning corner of a survey made for Daniel Guffy, thence with his first line S. 83 degrees W. 40 poles to a Locust, thence S. 35 degrees W. 40 p to chestnut, S. 55 degrees W. 122 poles to a line of a survey made for Peter Garbough & with the same S. 18 degrees W. 12 poles to a red oak his corner, thence S. 105 poles to a chestnut, S. 67 degrees E. 182 poles to a stake in said State line and with the same N. 295 poles to the beginning."

Mr. Monroe has located this line first from a corner pointed out to him by Joseph Guthrie as corner of his tract. This point is red "HI" on the map; and also by the point in a lane, shown him by Evans, who now owns the James tract, as above mentioned These points and line are in the same line running from the line of Marshall Friend's land along the Eastern boundary of Teets' land and Sylvanus Fike to Cherry Hill, and also the Western line of the Maryland Whipperwill tract. The old State line from this point runs due North by the same line to the Pennsylvania line, and is represented by the points red *"H4"*, *"WM"* in a red circle, *"H9"*, *"H10"*, *"H6"* and a point just West of *"WZ."*

Mr. Monroe then locates the tract of land belonging to William Fearer, just North of the Isaac James tract. It contains 50¼ acres, and the deed from which it is located, is Exhibit 18 filed with the deposition of Lucinda Fearer, found on page 1547 of the Record. This deed is from Joseph Fearer, Sr., and wife, dated April 17th, 1883. The description is as follows:

> "Beginning at *a Black oak on Md. and W Va. line with said N. ninety seven poles* to stone heap corner to John Vansickle, with his line S. seventy four degrees, W. one hundred and seven poles to stone heap corner to John Vansickle, S. Thirteen degrees E. ninety five poles to chestnut corner to Joseph Guthrie N. thirty five degrees E. ninety five degrees E. twenty eight poles to a locust. N.

Eighty three degrees E. forty two poles to the beginning, containing fifty and one fourth acres."

Lucinda Fearer testifies, page 1492, as follows:

She is the wife of William Fearer. Her husband owns about 37¾ or 38 acres. There was 45 acres in the tract, and 7 acres went to Alex Thomas, that he pays taxes for. Her husband, William Fearer, got the land from his father, Joseph Fearer, and witness produced the deed above mentioned. She and her husband live on the tract, and have lived on it fourteen years. The house was built by William Fearer. The old Maryland line is between the house and Alex Thomas, below the stable. The land runs to the old Maryland line, but does not extend beyond it. Her husband pays taxes on this land in Preston County, West Virginia, and has always voted there, at Glade Farms, and his father voted there before him. John, or Charlie Vansickle, owns the land lying North. His father's name is John Vansickle. Charlie is the son of John. George Evans adjoins them along the old line on the South. That is the place that George Taylor lives on. There is a public road near this house. West Virginia works the road to the Maryland line, and the Marylanders work up to it. That is the old Maryland line. Her husband works the road as a citizen of West Virginia. He was away from home at the time her deposition was taken.

Mr. Monroe also locates a tract of 85 acres and 25 acres belonging to Joseph Guthrie, and Guthrie's deposition is taken. (Record, page 1494.) He says that he lives in a house 50 to 75 yards West of the old Maryland line: that Monroe's line ran about half way between the Michler line and the old line. George Evans and William Fearer's lands lie between him and the old Maryland line, partly. There was an old house where his present house is built. The new one has been built twelve or thirteen years. These lands are all assessed and taxes are paid on them in Preston County, West Virginia. The County road is worked as far Eastward as the old Maryland line. The Maryland authorities have never worked any road in that neighborhood West of that line. The old line has been recognized by the people of this neighborhood as the boundary line between these States, so far as witness knows. Witness has always held there. They look upon the old line as being the standard. He is a minister of the Gospel, and has license to marry in Preston

County, West Virginia, and he marries up to the old line. Charlie Vansickle lies along the old line North of him.

Mr. Monroe locates the patent for 119 acres to Joseph Fear, dated January 31st, 1848, on a survey made April 19th, 1846. It is "Monroe Exhibit No. 32." (Record, page 1812.) It is represented on the map by solid black lines, enclosing the words "Joseph Fearer 119." (See Monroe's testimony, page 1681.) This patent, as located by Mr. Monroe, extends East of the line as recognized along here. He has also located on his map No. 2 patent from Virginia to Dan Griffith for 31 acres, dated August 31st, 1836. (Record, page 1985.) This corresponds practically with the William Fearer tract testified to by Mrs. Lucinda Fearer, above. This patent describes the land conveyed as "a certain tract or parcel of land containing thirty-one acres, situate in Preston County on a ridge between the waters of Little Sandy Creek and Buffalo Creek, north of the road leading from Jesse Spurgeon's to Silverport, adjoining the Maryland line where said road crosses and bounded as follows: Beginning at a black oak supposed to be in or near the Maryland line, near the Silverport road and running thence N. 11 E. 20 poles to a birch, &c."

Mr. Monroe next locates a patent granted by the Commonwealth of Virginia to David Vansickle for 100 acres, lying Northeast of the Fearer land. This patent is dated September 20th, 1834, on a survey made January 23rd, 1833. It is filed as "Monroe Exhibit No. 33," page 1813, and describes the land as follows:

> "A certain Tract *of* Parcel of Land, containing one hundred acres situate in Preston County on a small drain including two springs running into Buffalo Run which springs is near a half mile north of the road leading from Jesse Spurgeon's Selviesport & to adjoins John Mackey's entry and improvement on the East side and bounded as followeth to wit. Beginning at a white oak near two springs running into Buffalo Creek and running thence N. 60 W. 80 poles to a white oak thence N. 57 E. 124 poles to a stone pile thence N. 10 E. 85 poles to a stone pile thence N. 75 E. 79 poles to a small Spanish oak and stone pile thence S. 100 poles to a stone pile thence S. 50 W. 163 poles to the beginning."

Mr. Monroe testifies that the Spanish oak called for in this deed was pointed out to him by C. F. Vansickle, as a corner or

Lewis and David Vansickle's tracts, and as standing in the Maryland and Virginia line. This point is indicated on his map No. 1 by *red "H1"*, and this is in a direct line with the Eastern line of the Isaac James and the Freer lands, and the points *"G10"*, *"H3"*, *"H2"* and *"H13."*

Mr. Monroe also located, just North of this 100 acre patent, a patent from the Commonwealth of Virginia to Lewis Vansickle, dated November 10th, 1834, for 120 acres, on a survey made February 2nd, 1833. It is found on page 1814, and is "Monroe Exhibit No. 34." The survey is found on page 1815 and a copy of the map accompanying the survey is found between these two pages. Mr. Monroe's testimony as to the location of these tracts is found on pages 1681 to 1684, and is as follows:

> 553rd Q. I also hand you a certified copy of a patent from the Commonwealth of Virginia to David Van Sickle for 100 acres, dated September 20th, 1834, and ask you to file that with your deposition.
>
> A. I will do so, marked 'Monroe Ex. No. 33.'
>
> 554th Q. Have you indicated that Van Sickle 100 acres on the map?
>
> A. I have indicated it by solid black lines enclosing the words 'David Van Sickle,' and figures '100.'
>
> 555th Q. I also hand you a certified copy of a patent from the Commonwealth of Virginia to Lewis Van Sickle, dated November 10th, 1834, for 120 acres, and also will ask you to file that with your deposition.
>
> A. I will do so marked 'Monroe Ex. No. 34.'
>
> 556th Q. How is that tract designated on the map?
>
> A. That tract is designated by solid black lines, enclosing the words 'Lewis Van Sickle,' and the figures '120.'
>
> 557th Q. Does the description in the patent of the David Van Sickle 100 acres call for the Maryland line?
>
> A. I believe not. (Examines paper.) It does not.
>
> 558th Q. Have you a copy of the survey upon which that patent was based?
>
> A. I have.
>
> 559th Q. Will you file a certified copy of that survey with your deposition?
>
> A. I will, marked 'Monroe exhibit No. 35.'

560th Q. Does that survey call for a point on the Maryland line?

A. It does. The description in the patent and the survey are identical, with the exception of the fourth line, which in the survey calls north 75 east 79 poles to a small Spanish oak and stone pile on or near the Maryland line, and with it south 100 poles to a stone pile, south 50 west 163 poles to the place of beginning. The call in the patent to David Van Sickle is north 75 east 79 poles to a small Spanish oak and stone pile, thence south 100 poles to a stone pile, thence south 50 west 163 poles to the beginning.

(Mr. Sincell:) The location of the David Van Sickle and Lewis VanSickle patents is further objected to, because they are not located upon the plat, in accordance with the grants.

561st Q. Is there any difference in the manner in which you have located the Lewis Van Sickle and David Van Sickle tracts on the plat from the calls of those contracts in the patents?

A. There is. The line called for in the patent of David Van Sickle as run north 75 east 79 poles to a small Spanish oak and a stone pile, on or near the Maryland line is actually on the ground south 75 east 79 poles. The call in the Lewis VanSickle patent stated as north 75 east 79 poles is also south 75 east 79 poles on the ground. The call in the Lewis VanSickle patent above referred to as south 78 west 114 poles is actually north 78 west 114 poles, which appears to be an error in the description.

Excepted to on the ground that this location is an attempt to go behind the grant.

562nd Q. What reason have you for that location on the ground and the map?

A. The lines as shown to me and recognized by the parties holding, and upon which the fences were built were south east and north west 75 and 78 respectively.

563rd Q. So the present holdings of the parties conform to your location on the map? Is that correct?

Excepted to.

A. It is.

Excepted to.

564th Q. Did you run any reference lines in that locality?

A. At the end of 10,829.9 poles I ran reference

lines as follows: south 73¼ 41.25 poles, south 72 east 51.6 poles to a Spanish oak pointed out by A. F. VanSickle as a corner of the Lewis and David Sickle tracts, and as standing in the Maryland and Virginia line. This point is indicated on the map by red letter and figure 'H4.'

565th Q. Is there a Spanish oak called for in the original patents at that point?

A. Yes, sir.

Exception to the question and answer.

566th Q. Will you read the call?

A. In the patent to David Van Sickle for 100 acres this Spanish oak is called for, at the end of the line north 75 east 79 poles. In the patent to Lewis Van Sickle for 120 acres above referred to, this Spanish oak is called for at the end of the line north 75 east 79 poles to a stone pile and small Spanish oak.

567th Q. And in the survey for 100 acres upon which that patent is based, how is that Spanish oak called for?

A. This point is called for in the survey for 100 acres at the end of north 75 east 79 poles to a small Spanish oak and stone pile on or near the Maryland line. Continuing the reference lines from the Spanish oak above mentioned north 32 east 44 poles, north 45, 50 east 29.1 poles to a large white oak pointed out to me by Marshall Fike as a common corner to military lots 2997 and 2998.

568th Q How is that point designated on the map?

A. That point is designated on the map by the letters 'W. O.'

569th Q. Have you laid down those military lots 2997 and 2998 with reference to that point?

A. I have. They are marked on the map, laid down on the map in broken lines enclosing the figures '2997' and '2998.'

570th Q. And south of them you have laid down what military lot?

A. A. 2999.

571st Q. And that adjoins what Maryland grant on your map?

A. Adjoins a grant in Maryland called 'Granary' as laid down on the map.

572nd Q. Now, did you locate any dwelling houses on the Van Sickle land?

A. I did. At the end of 10,852 poles I passed on my reference line four poles east of C. T. Van

Sickle's barn. At the end of 10,864 poles on our line we passed six poles west of VanSickle's house. This house and barn is indicated on the map by two small square dots above the name 'VanSickle.' At the end of 10,942 poles on our reference line, we passed about 10 poles east of J. A. Fike's house. This house is indicated on the map by a small square dot under the name 'J. A. Fike.'

573rd Q. Going back to the Fearer tract of land, was there any one living on the land as located on your map?

A. There was. William Fear.

574th Q. Did you take a reference to his house?

A. Only approximately, at the end of 33 miles on our reference line we passed about 80 poles westward of this house. This house is indicated on the map by a small square dot near the figures 50¼.

Mr. Monroe located just opposite these lands a tier of Military lots Nos. 2999, 2998, 2997 and 2996. These he located from a large white oak pointed out to him by Marshall Fike, as a common corner of Military lots Nos. 2997 and 2998. This white oak is indicated on the map by the black letters "WO" between said lots. Lot No. 2999, lying South of these two lots, is also located. This lot, according to the Deakins map, adjoins the Maryland tract called the "Granary," as will be seen by reference to the said Deakins map, and the other lots above mentioned lie in a direct line North of this lot No. 2999. Mr. Monroe so locates them and locates the Granary in strict accordance with the Deakins location. Passing by the Granary, about which there is a difference of location between Mr. Monroe and Mr. Brown, there is a point marked on Monroe's map No. 1, with *black letters, "WM", enclosed in a red circle,* between Lewis VanSickle and George W. VanSickle, and just North of the point red "H4", which corresponds with the *point marked "WM"* at the end of the reference line on Mr. Brown's map, designated as "VanSickle Hill," some distance North of the Granary. Mr. Brown, in his report states that this represents a fence pointed out to him by Samuel M. Fike, a witness produced upon the ground on behalf of the State of Maryland, as being a point in the old line, and is shown upon the plats at the black letters "WM", and he gives the latitude and departure of this point and its distance from the Michler line. Mr. Samuel

M. Fike's testimony was taken upon this point, by the State of Maryland, and is found on page 1134. He testifies as follows:

Direct Examination.

Q. State your age, residence and occupation?
A. My age was 67. I live across here in Maryland, Garrett County. I am a farmer.
Q. Do you know Abram J. Thomas?
A. Yes, sir, I know him.
Q. Is he living or dead?
A. He is dead.
Q. When did he die?
A. I cannot tell you that.
Q. Well, about how long ago?
A About two years, as near as I can tell you.
Q. Mr. Fike, did you point out any object on the ground to Mr. Brown, the surveyor in this case, when he was making the surveys?
A. Well, I come there, and I think Mr. Monroe wanted me to go with them and show him where the old Virginia line was, and I went with them and I showed them where the old line was.
Q. What did you point out to Mr. Brown?
A. I didn't point anything out, only the fence there that was on the line.
Q. How much of a fence was there?
A. A good sized fence, and a pretty long fence; it runs through betwixt me and Marshall Fike's and George Sickle; Mr. Monroe knows.
Q. What old line was that?
A. Why, it was the old supposed Virginia line that I was always told, advised it was the old supposed Virginia line.
Q. Did they give it any particular name?
A Well, some of them did say it was the Fairfax line, some of the old fellows, you know.
Q. Did any of them call it the Deakins line?
A. I do not remember; I do not remember; I worked along the line on each side for farmers who owned land on both sides, and they always pointed it out that supposed line?
That is all.

Mr. Price—Cross-examination:
Q. Mr. Fike, how far do you live from here?
A. From here straight across, two miles and a half.

Q. About two miles and a half?
A. Yes sir.
Q. In which direction?
A. North, near north.
Q. Which side of that old Virginia line do you live on, east or west?
A. On the east side.
Q. How far from it?
A. Well, I have never measured it.
Q. No?
A. It is, I don't think over 100 rods.
Q. How long have you lived there?
A. I have lived at that place for 34 years.
Q. Do you own the land there?
A. Yes, sir.
Q. Do you own the land up to the old line?
A. No, there is a vacancy betwixt the old Virginia line and the lots.
Q. You own some of the Military Lots, do you?
A. Yes sir. A neighbobr of mine owns the vacancy and also the land on the Virginia side.
Q. Who owns that vacancy?
A. Marshall M. Fike.
Q. Marshall M. Fike?
A. Yes, sir.
Q. How wide is that vacancy between the Military Lots and the old line?
A. I never seen it measured but the owners told me 48 rods.
Q. Now, this fence, this old fence that you speak of, how long had it been there?
A. Since they put the fence there, that has been. It used to belong to one man and it come in different hands and they put this fence there, but the fence south of it has been there for many years.
Q. How many years?
A. It has been there for forty years.
Q. And is this new fence that you speak of made the division fence is that in the line of the old fence, south of it?
A. Yes, sir.
Q. What direction does that fence run?
A. It runs north and south. North and south.
Q. Now, did you say that VanSickle owned lands on both sides of that old line?
A. No, John Van Sickle, it was a corner, and he owns the land there, a corner of N. Fike's next, there is a number owns west of it.
Q. I understood you to say that there was a man

who did own the land on both sides.

A. That was Zachariah VanSickle.

Q. What I want to ask you is whether that land, on the west side of that old line or fence, was held under a Maryland or Virginia title?

A. Under a Virginia title.

Q. And the land held east of it by a Virginia title?

A. Yes sir, I knowed the parties.

Q. Did you see where Mr. Julius K. Monroe ran a line in 1894 along there, the first line run in this case?

A. I think I did. He run southeast, I think, but I did not look; I went on up, that is as far as I know.

Q. Where did Abram J. Thomas live?

A. He lived not very far there from the Mud Pike.

Q. On which side of the old line?

A. Well, I cannot tell that precisely which side he lived on. I never was along from there where it was run, you know.

Q. Did Abram Thomas live, or claim to live, in Maryland or West Virginia?

A. In Virginia, as well as know; I never knew him to vote in Maryland anyhow; I think he claimed his residence in Virginia on account of he would be in the same district with me.

Q. Mr. Fike, are there any public roads, there between the old line you have been speaking of and the Michler line, west of it?

A. Public road?

Q. I mean a county road?

A. Yes sir; I do not know whether they have it on the County or not, but it is a county road.

Q. Now, what I want to ask is, which County worked the roads up to this old line and west of it?

A. Maryland.

Q. On the east?

A. On the east.

Q. And which worked it on the west?

A. Virginia; I worked on both, so I can answer that question pretty well.

Q. Maryland then never worked the road beyond the old line?

A. Not as I know of, if they did, I do not know it."

The next point in the old line, located by Mr. Monroe, is

indicated by *red "H6" East* of the tract marked "Horace Luddington" and between Umble and Levi Fike. This line is in the same line as the point, shown by Mr. Brown, "*WM.*", points "*H4*", "*H13*", "*H2*", "*H3*", "*G10*", &c. Mr. Monroe's testimony upon this point is found on page 1684. He testifies that he began at a white oak pointed out by Marshall Fike as corner of Military Lots 2997 and 2998, and ran North, passing a stone pile which was shown him by Marshall Fike as the corner of Lots 2997 and 2996. This point he indicates on the map by *red "H5"*. We now quote his testimony:

> "Continuing at the end of 265.1 poles crossed into McDermott's land as shown by Fike. At the end of 366.5 poles crossed line fence between McDermott and Levi Fike. At the end of 466.4 poles crossed line fence between Levi Fike and Taylor Umble. From this point I ran west 44.45 poles to a corner of Levi Fike, and Taylor Umble in Lewis's line, pointed out, as I recollect, by Marshall Fike as standing in the old state line. This point is marked upon the map by *red letter and figure 'H6'*."

Leaving said point red "H6", Mr. Monroe continued his main reference line and located a planted stone on the Mason & Dixon's line, which is indicated on his map by the word "Monument" and a square dot in the Pennsylvania line. He describes this monument on page 1684, as follows:

> "This monument is a square hewn stone, about fifteen inches square, four and one half feet high, hewn to flat pyramidal shape on top, standing on a stone sub-base, on what appears to be an old mound elevated perhaps eighteen inches, and has the following inscriptions: on the north side, 'Pa. 1885, 552-110, M' on the west the letters 'Pa.' and W. Va.' with a vertical line out between; on the south the letters 'W. Va.' and 'Md.' with a vertical line out between; on the east the letters 'Md'. and 'Pa.' with a vertical line out between."

This point is also designated on Mr. Brown's map by a round dot and the figures "55.2." just above it, and the letters "WN" just below it. In connection with this point, the State of West Virginia filed the final report of the Joint Boundary Commission on the parallel boundary between West Virginia and Pennsylvania,

printed in 1886. From this pamphlet it is evident that the stone just described is the one set up by the Commissioners, who surveyed and marked the boundary line between Pennsylvania and West Virginia in 1885. It is true that the State of Maryland was not a party to the making of this Mason & Dixon's line, and this pamphlet was merely introduced for the description of the monument located by these Commissioners at the point where the States of Maryland, West Virginia and Pennsylvania were supposed to come together. It appears that the Commission determined to locate a stone at this point of intersection. This is shown by their report (Record, page 1817, of the printed Record), in which the following language is used:

> "Acting on the same principle which controlled it in the establishment of the North and South boundary between Pennsylvania and West Virginia, this commission determined to terminate its work at what has been known for years as the intersection of the Virginia and Maryland boundary and the southern line of Pennsylvania. On motion of Mr. Gist, it was resolved, that a suitable monument should be erected at the point above mentioned and that the commissioners and Mr. Sinclair should be present to superintend its location."

Afterwards, Mr. Sinclair indicated the first of April as the time when he could be present at the erection of the monument in the Maryland line, and Mr. Gist and Mr. Hogue met Mr. Sinclair at the appointed place. We quote further from the report (Record, page 1818.)

> "The spot for locating the monument was first ascertained by measurement from the meridian monument erected by Lieut. Miehler, of the U. S. Engineers (whose notes Mr. Sinclair had obtained) and from the testimony of adjacent land-owners, old residents and surveyors."

A full description of the monument was given in Mr. Sinclair's report. On the North face is inscribed the date of survey, 1885, and the initials "Pa." The South, East and West faces are divided into equal parts by a vertical line intended to show the intersection of the State lines. On the North half of the East face is inscribed the initials "Pa"; on the South half the initials "Md.";

on the East half of the South face, the initials "Md."; on the West half the initials "W. V.", and the South half of the West face bears the initials "W. V.", and the North half the initials "Pa." And on page 1822, Mr. Sinclair, of the Coast and Geodetic Survey, employed by these Commissioners, describes the Michler monument and also the new monument as follows:

> "The next mark is the large sandstone that marks the north end of the meridian through the Fairfax stone on the east side of the Brandonville and Somerfield pike. This stone was set in 1859 by the party of Lieutenant Michler. It is about fifteen inches square at the base, tapering smaller towards the top and terminates in a pyramid. It is six feet long, three and a half feet out of ground. The north side is owned by John Glass, south side by Sebastian Dean. Distance from the initial is 18.65 miles and 310.51 feet north of the tangent.
>
> The last mound marks the junction with Maryland. It is three fourths of a mile east of the stone above described.
>
> The new monument was placed in the center, and is 19.45 miles distant and 333.53 feet north of the tangent.
>
> Abram Thomas owns the land on the south side. This monument is sixteen inches square, dressed three and one half feet and rough cut three and one half feet. The underground cube is 16x16x16 inches."

The Michler monument is indicated on Mr. Monroe's map by the words "Michler Monument" and a square dot in the Pennsylvania line. This, Mr. Sinclair says, is three-quarters of a mile West of the stone planted by the Pennsylvania and West Virginia Commissioners in 1885, and this agrees with Lieutenant Michler's report, which will be mentioned hereafter.

Mr. Brown reports (page 949), that Abram J. Thomas, a witness produced on the ground on behalf of the State of Maryland, pointed out to him an old mound in the Mason & Dixon's line as being a point in the old line; that is, the old line between Maryland and West Virginia, and which said point is shown upon his plats by the *black letters* "WZ". This same point is shown by ***black letters*** "WZ", *enclosed in a circle*, on Mr. Monroe's map, and practically agrees with the points in the old line heretofore located by Mr. Monroe; that is, points "*G10*", "*H2*" "*H4*"; "***W P***" *enclosed in a red circle, and* "*H6.*" And this agrees

with the location of the tract of 100 acres granted by the Commonwealth of Virginia to Jacob Thomas, dated January 18th, 1837, filed in this cause as "Monroe Exhibit No. 37". (Record, page 1831.) The description of the land conveyd by this patent is as follows:

> "Containing one hundred acres, situate in Preston County on a small drain running into Scrub glade run along & adjoining the Pennsylvania & Maryland lines bounded as follows: Beginning *at a stone pile on the Pennsylvania line & supposed corner of the Maryland line & running thence with the Maryland line S. 160* poles to a stake and small spanish oak thence leaving said line and running W. 100 poles to a stone pile Thense N. 160 poles crossing a branch of scruby glade run to the Pennsylvania line & thence with said line E. 100—to the Beginning with its appurtenances."

It will be noted that this patent, according to this description, lies in the extreme Northeastern corner of Preston County, West Virginia, on the Pennsylvania line, calling to begin at a stone pile on the Pennsylvania line, and supposed corner of the Maryland line, running thence with the Maryland line South 160 poles to a stake and small Spanish oak, &c; thence runs around in a square to the Pennsylvania line again. A copy of the survey is found on page 1832, and map, accompanying that survey, between pages 1830 and 1831. Now the State of Maryland, on the 5th day of September, 1842, granted the land in this corner, on the Maryland side; that is, the extreme Northwestern corner of Garrett County, Maryland, to Thomas Hammond, by patent bearing date, as above mentioned, September 5th, 1842, on a survey made January 9th, 1839. The tract is called Hammond's corner and is described in this patent as follows:

> "Beginning at the South-West corner of Lot No. 2995, lying Westward of Fort Cumberland, it being at the end of the second line of said Lot, and running thence with the third line of each of Lots No 2995, 2994, 2993, 2992, 2991, and with part of the third line of Lot No. 2927, North, five hundred and sixty-five perches to the Pennsylvania line; and with it West, forty-eight perches *to the Fairfax line, commonly called the Virginia line;* and *with said line*

South, five hundred and sixty-five perches; then by a straight line to the beginning.

Containing one hundred and sixty-nine and one-half acres."

It is apparent from the description that this tract of Hammond's corner was intended to take up a strip of land 48 perches wide between the Military lots Nos. 2995, 2994, 2993, 2992 and 2991, and part of 2927 and the Fairfax line, commonly called the Virginia line. And the testimony in this case shows that there is a space there about 48 poles wide, and the location of the old line, as made by Mr. Monroe, by his points indicated in red letters and figures above mentioned, agrees with this location of Hammond's corner in relation to this line and the Military lots. Mr. Monroe's testimony, as to the location of this patent to Jacob Thomas of 100 acres, is found on page 1685, and is as follows:

"578th Q. I hand you a certified copy of a grant by the Comonwealth of Virginia to Jacob Thomas, dated January 18th, 1837, for 100 acres, and will ask you to file the same with your depositions?

A. I will do so, marked "Monroe Ex. No. 37."

579th Q. Is that patent represented on your map?

A. It is. It is shown by solid black line enclosing the words 'Jacob Thomas' and figures '100.'

580th Q. Was there any house on this tract of land?

A. There was.

581st Q. Who was living in it when you were there?

A. Abram Thomas is my recollection—or Abraham, I have got it Abe Thomas here (referring to memorandum book.)

582nd Q. Have you indicated that house on the map?

A. I have.

583rd Q. How?

A. I have indicated it by a square dot and the word 'Thomas.'

548th Q. How did you locate it?

A. That is located proximately from my knowledge of the position of the house with reference to the lines. I did not measure it. I did not take any accurate measurement.

585th Q. What reasons had you for locating that 100 acre Thomas survey in the manner in which you have done it?

A. My recollection is that Mr. Thomas pointed out his northeast corner to me as standing at the intersection of the line called the old Maryland line with the Mason & Dixon line. I am not positive of this, however.

And his testimony with relation to the location of Hammond's corner patent is found on page 1686, and is as follows:

"593rd Q. I hand you a patent from the State of Maryland to Thomas Hammond called 'Hammond's corner' for 169 1-2 acres dated September 5th, 1842, and will ask you to file the same with your deposition.

A. I will do so marked 'Manroe Exhibit No. 39.'

593rd Q. According to the Deakins map of the military lots where would lot 2995 lie with reference to 2996?

A. It would lie directly north of it.

594th Q. Where would 2994, 2993, 2992, 2991, and 2927 lie?

A. Directly north—

595th Q. If then you have correctly located lots 2999, 2998, 2997, and 2996, where would this survey of 'Hammond's Corner' lie?

A. That land lies west of these lots 2995, 2994, 2993, 2992, 2991 and 2997.

597th Q. And where on your map—what territory would it cover?

A. It would cover the territory lying between the Jacob Thomas tract, Horace Luddington tract, Elijah Fike on the west, and the west line of the lot 2996 as laid down on this map produced northward.

598th Q. Do I understand you then to state that if the military lots are correctly located, this tract would lie west of those lots?

A. Yes, sir.

599th Q. What is the width of the Hammond's Corner?

A. 48 rods, I think, 48 perches.

600th Q. What is the width of the space represented by the line of the military lots extended and the Jacob Thomas survey as indicated on your map?

A. About 46 rods.

South of the Thomas tract Mr. Monroe has laid down a tract indicated on the map by the words "Horace Luddington 106, now Lewis." A copy of this patent is filed as "Monroe Exhibit No.

38". (Record, page 1832.) It is dated November 29th, 1833, on a survey made January 23rd, 1833. The land is described as follows:

> "There is granted by the said Commonwealth unto Horace Ludington a certain Tract or Parcel of Land containing one hundred and six acres situate in Preston County on Scrub Glade Run, E. Fork and bounded as followeth, to-wit: Beginning at a stone, corner to Jacob Thomas survey of 100 acres and running thence with the second line of the same reversed E. 100 poles to a stake and small Spanish oak, thence S. 120 poles to a small black oak, thence W. 94 poles to a white oak, thence N. 65 W. 76—to three white oaks, thence N. 6 W. 27 poles to a black oak, thence N. 38 E. 66 poles to a white oak, thence N. 60 E. 28 poles to the place of beginning."

His testimony as to the location of this tract, found on page 1665, is as follows:

> "586th Q. I hand you a certified copy of a patent from the Commonwealth of Virginia to Horace Ludington for 106 acres, dated November 29th, 1833, and ask you to file it with your deposition.
>
> A. I will do so, marked 'Monroe Ex. No. 38.'
>
> 587th Q. Is that patent designated on your map in any way?
>
> A. It is. It is laid down in solid black lines enclosing the words 'Horace Ludington, 106, Now Lewis.'
>
> 588th Q. Does it call for any other survey?
>
> A. It calls for beginning at a stone, corner to Jacob Thomas survey of 100 acres, and running thence with the second line of the same reversed east 100 poles to a stake and a small Spanish oak.
>
> 289th Q. Was there any house on that tract of land?
>
> A. Yes, sir.
>
> 590th Q. Who was living in it?
>
> A. At the time we were there, Elzey VanSickle was occupying the house.
>
> 591st Q. Is that the same house designated on the map by the word 'D. Lewis.'
>
> A. It is.

592nd Q. What are the common lines, if any, between that and the Jacob Thomas survey?

A. The common line in the tract patented to H. Ludington for 106 acres calls for beginning at a stone, corner to Jacob Thomas survey of 100 acres, and running thence with the second line of the same reversed east 100 poles to a stake and small Spanish oak. In the description of the Jacob Thomas tract of 100 acres the following calls appear: Beginning at a stone pile on the Pennsylvania line and supposed corner of the Maryland line and running thence with the Maryland line south 160 poles to a stake and small Spanish oak, and thence, leaving said line and running west 100 poles to a stone pile."

Just South of this Luddington tract, Mr. Monroe has located a tract patented to Samuel Boger for 80 acres, dated May 1st, 1860, on a survey made the 11th day of September, 1859. (Record, page 1835 and 1836.) The description is as follows:

"There is granted by the said Commonwealth unto Samuel Boger, a certain tract or parcel of land containing eighty acres, *lying in Preston County, adjoining the Maryland line*, Abraham, Thomas, Hagan & Scott, and John Fike and bounded as follows, viz: Beginning at a white oak corner to said Fike & Hagan & Scott and running with 7 of Fike's lines reversed S. 38 W. 66 poles to a black oak and stake, S. 6 E. 27 poles to three white oaks, S. 65 E. 70 poles to a white oak, E. 48 poles to a stake S. 9 E. 154 poles to a stone pile and pointers, E. 11 poles to a stone pile, N. 79 E. 8 poles to a stake in the Md. line, thence with the same N. 154 poles to a stake in Abraham Thomas' line, with two of his lines W. 66 poles to pointers, N. 120 poles to a stone pile corner to Hagan & Scott, with two of their lines reversed W. 38 poles to a stone pile and pointers, S. 60 W. 28 poles to the beginning with its appurtenances."

And just West of that he locates a tract of 388 acres, patented to John Fike, filed in this case "Monroe Exhibit No. 42", (Record, page 1836,) dated June 30th, 1848, on a survey made July 3rd, 1847. The description is as follows:

"There is granted by the said Commonwealth unto John Fike, a certain tract or parcel of land containing

three hundred and eighty-eight acres, lying and being in the county of Preston on the waters of Sandy Creek adjoining lands of Dunham, Benjamin Shaw, Jacob A. Thomas & Martin and bounded as follows, viz: Beginning at a white oak corner to said Dunham and with three of his lines, S. 48 E. 71 poles to a white oak, S. 27 W. 60 poles to a white oak, S. 77 E. 297 Poles to a Stake corner to Wm. Robinson, with his line E. 100 poles to 2 pin oaks, N. 98 poles to a stone pile in said Shaw's line, with four of his lines S. 52 W. 15 poles to a white oak, S. 79 W. 88 poles to a stone pile, W. 11 poles to a stone heap and pointers, N. 9 W. 154 poles to a stake in said Thomas' line and with four of his lines W. 48 poles to a white oak, N. 65 W. 70 poles to three white oaks, N. 6 W. 27 poles to a black oak, N. 38 E. 66 poles to a white oak, N. 53 W. 34 poles to a stone pile corner to said Martin, with two of his lines S. 32½ W. 151 poles to a white oak, S. 62 W. 109 poles passing said Martin's beginning corner at the end of 76 poles to the beginning with its appurtenances.'

Mr. Monroe's testimony as to the location of the John Fike survey of 338 acres and the Boger survey of 80 acres is found on pages 1588 and 1689, and is as follows:

"611th Q. What tract of land have you located on your map just south of the Horace Ludington tract?

A. The John Fike survey of 388 acres and the Boger 80 acre tract.

612th Q. Does the Boger tract all lie south of the Horace Ludington?

A. No, sir.

613th Q. Just explain.

A. There seems to have been another survey cutting through, and taking the western portion of the Ludington survey.—in the Boger tract.

614th Q. Why do you locate it on the western part of the Horace Ludington and south of it, as you have?

A. From the description in the surveys, which call for these corners and the corners of the Fike survey.

Objection to the method of location.

615th Q. Will you file the certified copy of the patent to Samuel Boger for that tract of land, with your deposition—80 acres?

A. I will, marked 'Monroe Ex. No. 41'. This survey upon which the patent is issued is dated September 11th, 1859. The patent is dated in 1860.

616th Q. What are the common lines between this tract and the Horace Ludington 106 acres?

A. The lines referred to in this survey which are common or practically so with those of the Ludington survey are as follows: 'Beginning at a white oak, corner of said Fike, Hagans and Scott, and with 7 Fike line reversed, south 39 west 66 poles to a black oak and stake south 6 east 27 poles to three white oaks, south 65 east 70 poles to a white oak, east 48 poles to a stake. The calls in the Ludington 106 acre tract common with the Boger lines are as follows: West 94 poles to a white oak, thence north 65 west 76 to three white oaks, north 6 west 27 poles to a black oak, thence north 38 east 66 poles to a white oak.

617th Q. Now, you said that you located also south of the Ludington tract a tract of John Fike for 388 acres. Will you file a copy of the patent to John Fike with your deposition for said 388 acres?

A. I will, marked 'Monroe Ex. No. 42.' The patent is dated in 1848.

618th Q. Has that John Fike patent common lines with the Ludington and the Boger?

A. It has.

619th Q. Please give them.

A. The lines in the Fike tract common with the Ludington and Boger tracts are as follows: West 48 poles to a white oak, north 65 west 70 poles to three white oaks, north 6 west 27 poles to a black oak, north 38 east 66 poles to a white oak.

620th Q. I notice that the description of the Samuel Boger 80 acre tract calls at the end of the line north 79 east 8 poles to run to a stake in the Maryland line. Will you indicate on the map where you have represented that point to be?

A. I will. This point is indicated on the map by red letter H figure 9.

621st Q. And the next call is thence with same north 154 poles to a stake in Abram Thomas's line. Will you indicate a point on the map that represents the end of that 154 pole line?

A. I will. That point on the map is represented by red letter and figure 'H10.'

622nd Q. Is that a corner of the Horace Ludington tract?

Exception.

A. It should be; yes, sir."

Mr. Monroe also located the William Robinson patent of 528 acres, dated August 30th, 1847, and the William Robinson patent of 100 acres. They are filed as Monroe Exhibits Nos. 43 and 44. (Record, pages 1837 and 1839) and his testimony as to how they were located is found on pages 1689 and 1690, as follows:

"623rd Q. Did you locate on your map any patents south of the John Fike 388 acre tract?

A. I laid down on the map south of these tracts two other patents, William Robinson 528 acres, and William Robinson 100 acres.

624th Q. Will you file with your deposition a certified copy of that patent to William Robinson for 528 acres?

A. I will, marked 'Monroe Ex. No. 43'. This patent is dated August 30th, 1847.

625th Q. How is that William Robinson patent represented on the map?

A. It is represented by solid black lines enclosing the words 'William Robinson', and figure '528.'

626th Q. Does it include the land covered by the names William and J. A. Fike and Isaac VanSickle?

A. Yes, sir, and a part of that marked 'George W. VanSickle.'

627th Q. Why did you locate that on the map as you have?

A. It has lines common with the Lewis VanSickle patent and is located to adjoin.

Exception.

628th Q. Please give the common lines between those two patents.

A. The calls in the William Robinson tract common with the Lewis VanSickle are given as follows: in said patent: 'South 49 east 56 poles to a Spanish oak, corner to Lewis VanSickle, and with his lines north 78 west 114 poles to a white oak and stone pile, south 20 west 83 poles to a chestnut, south 7 east 64 poles to a white oak near a drain. The lines in the Lewis VanSickle patent for 120 acres common with the Robinson lines are as follows, south 78 west 114 poles to a white oak and stone pile, south 20 west 38 poles to a chestnut, south 7 east 64 poles to a white oak near a drain. The call above referred to as south 78 west 114 poles, I ascertained by survey on the ground to be north 78 west.

629th Q. Will you file with your deposition a certified copy of the patent to William Robinson for the 100 acres, which you have stated that you laid down on your map south of the John Fike 388 acres?

A. I will, marked 'Monroe Ex. No. 44'. The date of said patent is January 31st, 1848.

630th Q. How is that tract of land indicated on your map?

A. It is indicated by solid lines enclosing the name 'William Robinson' and the figures '100.'

631st Q. Why did you locate that 100 acres where you have on the map?

A. In the description it has common lines with the Lewis VanSickle 120 acres, and calls for that tract, and also has common lines and calls for the John Fike 388 acre tract and Robinson's 528 acre tract.

Objected to.

632nd Q. Will you give the common lines of this tract with each of the three tracts you have mentioned designating them as you go along.

A. The lines common to the Lewis VanSickle tract are as follows: South 49 east 56 poles to pointers, corner of the Lewis VanSickle, and with his line reversed east 41 poles to a stone corner, thence with his line reversed south 5 poles. The lines in this tract common to the lines of the William Robinson tract of 528 acres is south 49 east 56 poles to pointers. The line—of this tract common with the lines of the John Fike tract are as follows: West 100 poles to a stake, corner to John Fike, and with his line reversed north 77 west 52 poles;"

which shows that they call for adjacent tracts and they are all located with reference to each other, as they are obliged to be.

We cannot take the time or space to give in detail all the testimony as to the location of other patents and the holdings of the land owners at present, as located by Mr. Monroe upon his map, but we respectfully refer the Court to his report and testimony, and we think it will be seen that all these tracts and landholdings have been properly located with reference to the Michler meridian line and the old State line, as well as to the line run by Mr. Brown from the Brown-Potomac Spring. The map has been carefully made by comparing patents and deeds with each other and by locating corners and lines upon the grounds with reference to streams, mountains, houses and other objects as well as the monu-

ments placed upon the Michler and other lines. The testimony which we have been discussing, shows clearly that the boundary line recognized by all the citizens on both sides, practically from 1789 to the present time, can be easily traced and located by objects and property lines on the grounds. Mr. Monroe has prepared a map, marked "Map No. 3," which he describes as follows:

> "1007th Q. At my request you have also prepared map No. 3. Will you state what that is intended to represent?
>
> A. Map No. 3 is intended to represent the eastern boundary of Virginia land grants as held by citizens of West Virginia as the old state line, and the several points located in said line as shown on Maps Nos. 1 and 2, and also the Fairfax meridian or Michler line as laid down on maps Nos. 1 and 2, as well as the streams and roads shown on the former maps.
>
> 1008th Q. Does it also show where the property lines of the different tracts are at present held, according to the way you have located them?
>
> A. It does also show the sections of the property lines where the same intersect the eastern lines of the properties, together with the names of the property owners.
>
> 1009th Q. In running your reference line in 1894, what checks and references, if any, did you take from time to time with the Michler line?
>
> A. I ran reference lines to all the known points on the Michler line?
>
> 1010th Q. What was that for?
>
> A. That was for the purpose of getting an accurate line to lay down our property lines from. All the tracts, etc., laid down with reference to this reference line are laid down from the measurements thus taken.
>
> 1011th Q. So that the tracts that are laid down upon the ground are laid down with reference to the actual location of the Michler line upon the ground, as well as with reference to the reference line you ran?
>
> A. They are. This reference line was laid down on the map between each of these points that I ran tie lines to the Michler line monuments and stations on, so as to eliminate as much as possible the error that might come from a needle line." (Record, page 1716.)

The old, or Deakins line, as claimed by West Virginia in this case is indicated on said map as beginning at the Fairfax Stone, and by the black letters in red circles "WC", "WD", "WF", "WG", "WI", "WK,", "WL", "WM" and "WZ". These are the points laid down by Mr. Brown upon his map as being points in the old Deakins line; and the following points, represented in red letters and figures on Monroe's map No. 1 as points in the old Deakins line, correspond with this line on Map. No. 3: "A12", "A1", "A5", "A2", "A15", "A3", "A4", "A10", "A6", "A7", "A8", "B1", "B5", "B2", "B6", "B7", "C2", "C13", "C9", "C1", "D½", "D1", "D2", "D6", "D4", "D5", "D3", "D9", "D7", "D8", "D11", "D17", "D16", "D13", "D18", "E1", "F1", "F6", "F3", "F4", "G1", "G11", "G4", "G10", "H3", "H2", "H13", "H4", "H9", "H10" and "H6". All of these points, as heretofore shown, are proven by the testimony and location of the lands to be in the old line, and the Eastern line on Monroe's Map No. 3, gives this line as claimed by the state of West Virginia.

The Spring at Cranesville

The state of Maryland introduces certain evidence about a line having been drawn through a spring located in the edge of the village of Cranesville, in Preston County, very considerably west of the Michler line when the Deakins line was run. It appears to us that this testimony is utterly unreliable, and we do not understand very well the purpose in introducing it. It is briefly as follows:

John P. Lewis testified on behalf of the state of Maryland, (Record, page 1122) that he pointed out to Mr. W. McCulloh Brown a spring in the village of Cranesville, which is marked upon Mr. Brown's map by the word "spring" and the letters "W.J", and on Mr. Monroe's map by the word "Spring" within the lines of the old Maryland patent of the Diadem. This old man Lewis, who was kind of a floating old fellow in that country, testified that when he was a boy he worked for old Johnny Crane. He heard Gaby Friend, sixty years ago, swear that they run the Maryland-Virginia line through that spring. He thinks he said that Deakins was the surveyor at the time. He told the extraordinary story that there was a dispute about taxes and they sent

for this man, Gaby Friend, and he swore that the line run right through the spring and Deakins was the surveyor, and old Johnny Crane took Friend's affidavit or oath, somebody was having a dispute with old Johnny. His testimony is very hazy as to what took place, but, on cross examination, on page 1124, he testifies that the state line was recognized as running to a chestnut tree on the other side of the Crane place, that old man Crane lived in the house east of the spring; always claimed his home in Virginia. He worked for him, and he paid his taxes in Virginia. On page 1126 he says he doesn't know that he ever heard anybody recognize that spring as on the state line.

Upon the same point D. Harrison Friend was called and testified that he heard his father, John Friend, and his uncle, Gabriel Friend, say that when they laid off the soldier lots they laid them so as to be sure they was on the Maryland side of the line so that the soldiers could not be cheated out of the land awarded them. He heard his father say William Hoye was the surveyor when they located the Military lots. He did not say anything about their running this line through this spring.

Thomas Browning, (Record, page 1097) testifies that he is eighty-five years old; that he was present at a trial before his father, Meshack Browning, and by suggestive question on page 1099, this old man testified that William W. Hoye, Gabriel Friend and John Friend testified at that trial that William Hoye was the surveyor on the line between the states; that they came to that spring, which he supposes was then in the woods, he does not know, and they carried the chain right over the head of the spring, leaving the head of the spring in Virginia just over the line. He says he recollects it distinctly. They all three testified to the same thing. They are all now dead. He was a boy twelve or fifteen years old.

On cross-examination, the old man states that his father took up some territory under a Maryland patent called "Scales", between the Military lots and the Virginia line, and that the width of the tract of land between the Military lots and the Virginia line was about eighty or one hundred rods. This was taken up long before the Michler line was run, about 1829 or '30. This tract covered several Military lots—six he thinks. And he says that a man by the name of Summers, who lived between a quarter and a half mile East of the spring sued the sheriff of Preston

County for levying on his property for taxes; that he was between ten and fifteen years old,—might have been twelve, thirteen or fourteen—not more than fifteen. This testimony is absolutely unreliable and clearly relates to some other transaction than the running of the Deakins line. This is apparent on the face of the testimony. It will be remembered that Deakins was laying out the Military lots. His map shows that these lots were laid out along the line as he located it and manifestly they were laid out along a line running North and South. The location of these Military lots East of Cranesville is shown by both Mr. Monroe and Mr. Brown, Mr. Brown giving the location of a number of the lots just North of the Eastern portion of the Diadem. This man Browning, who gives this testimony, also testifies that his father took up, under a Maryland patent, the land between the Military lots and the old Deakins line, in 1829, showing that his father understood and he understood and everybody else understood that these Military lots were located a long distance East of the spring over which this chain is alleged to have been carried.

This is also shown by the testimony of Mr. W. McCulloh Brown, on cross-examination, (Record, page 1077) which is as follows:

> "Q. The point you speak of as pointed out to you in the Deakins line is the spring that was pointed out by our friend, the grubber, Mr. Lewis, in the town of Cranesville?
>
> A. It is, yes.
>
> Q. Now, is there not another spring about in that locality considerably east of that point, known as the Boiling Spring?
>
> Objection by plaintiff.
>
> A. I do not know anything of a boiling spring.
>
> Q. Wasn't there a large spring some distance east of this that Lewis talked about in Cranesville, about the old line as claimed by the people along there?
>
> A. I have not seen any spring there.
>
> Q. Well, there is such a spring; have you never heard of it?
>
> A. I have never heard of that as the Boiling Spring; I have never heard of any spring other than those that break out all along this glady country

there; I never heard of a particular spring or large spring, had none pointed out to me other than the ones shown by witnesses.

Q. Did you never hear the testimony of Lewis and Thomas Browning, that there was a line run as the Deakins line?

A. There was a line run at that point by Deakins, a northerly line, a line running north from that spring.

Q. What do you suppose Deakins was running a line through there for?

A. I have no information in regard to it.

Q. He was not running out Military lots, was he?

A. No, not there.

Q. How far east of that are the Military lots?

A. From a half mile to three quarters of a mile east.

Q. So that he was not engaged in the commission that he was directed by the Governor and Counsel of the state of Maryland to perform, if he was running a line through the spring at that time?

A. He was not laying off the lots, certainly, at that point.

Q. And he was not running the true north line from the Fairfax stone through that spring?

A. I do not know what he was doing, other than he run a line across the spring in a northerly direction, according to the testimony of the witnesses."

Maryland Made no Grants West of the Deakins Line After it Was Run Until After the Michler Line was Run in 1859.

Mr. Brown has located upon his map, as heretofore shown, several old patents granted by the state of Maryland extending Westward of the Michler line, and has located two or three Virginia patents, which extended Eastward of the Deakins line, but these patents were all based upon surveys made prior to the running of the Deakins line. We give them in their order, going North on the map.

Maryland Patents.

Royal Charlotte, Kindness, Ashby's Cove, The Promised Land, Thomas & Ann, Nonpareil, The Diadem, Elder Spring, Cherry Hill and the Granary. We have shown that that part of each one of these tracts that lies west of the Deakins line, in West Virginia, has been covered and taken up and is now held under patents issued by the State of Virginia.

Ashby 300 Acres, Hooker 2251 Acres, Deakins 6000 Acres and Deakins 138 Acres. We have shown that that part of the William Ashby patent, which lies East of the Deakins line, is covered by the Maryland tract of Ninesburg; that portion of the Hooker tract, which lies East of the Deakins line is covered by various Military lots laid out by Deakins and granted by Maryland. The Deakins 6000 acres does not extend beyond the Deakins line, and practically conforms to it and is the foundation of the present Virginia titles and holdings; and that the Deakins 138 acres lies several miles East of the Deakins line claimed by the states of Virginia and West Virginia, and neither of these states have ever attempted to claim any jurisdiction over the territory covered by it.

Prior to the running of the Deakins line, the Maryland patent of Mt. Pleasant, which was surveyed in 1774, called to begin at a point on the state line located due north from the Fairfax stone, and the following patents also called for said line: patent to Zarah Osborne, granted in 1785 has the following call:

> "Beginning at pointers on the Maryland line, corner to John Pettyjohn, and running with the Maryland line due South 282 poles to a maple."

The patent to John Pettyjohn for 400 acres, granted in 1784, (Record, page 463) grants 400 acres adjoining the Maryland line, and has the following calls:

> "Beginning at a white oak in the Maryland line, &c": and then runs several lines around to pointers on the Maryland line, and with said line North 226 poles to the beginning.

The John Pettyjohn patent for 330 acres, granted in 1784, as the following call:

> "Beginning at pointers in the Maryland line, and corner to his residence survey, and running with said Maryland line S 212 poles to a white oak, &c."

The Goff survey of 1000 acres, granted in 1787, (Record, page 1776) has a call to run to a white oak in the Maryland line, corner to said Pettyjohn: thence N, with said line, 400 poles to a white oak.

The Goff patent for 868 acres, (Page 1777) granted in 1787, does not call specifically for the Maryland line, but calls to begin at a white oak, corner to said Goff's other survey, and running thence N 320 poles to a forked maple. This is the same white oak standing in the Maryland line.

The Goff survey for 500 acres, granted in 1792, on a survey made September 15th, 1787, grants 500 acres, adjoining the Maryland line and on the North side of lands surveyed for said Goff, and has the following call:

> "Beginning at a maple, corner to his other lands on the Maryland line and running with said line N 160 poles to a hickory."

The patent to William Deakins, Jr., just North of the Goff 500 acres, granted by Virginia in 1788, has the following call:

> "Beginning at a white oak marked with ten notches, standing on a north line just over the head of the North branch of the Potomac, and between the seventh and tenth mile on the same, and running W 41 poles to a forked maple, beginning of Goff 241 acre survey, &c."

The last call is "to a white oak, sugar and pine, thence E 218 poles to intersect a North line from the beginning."

The William Ashby, assignee of John Simpson, 300 acre patent, granted in 1787, describes the land as lying in the county of Monongalia, on the main branch of Yohogania River, adjoining the Maryland line and bounded as follows:

The William Ashby patent for 200 acres, granted in 1787, describes the land as lying in the County of Monongalia on the waters of Snowy Glade Creek, adjoining the Maryland line. As will be seen, this tract begins at a chestnut on the Deakins line, as shown in the evidence.

The Francis and William Deakins survey of 6000 acres, which was patented in September, 1789, but was based on a survey made in 1788 (Page 824 of the Record,) describes the 6000 acres as "lying and being in the County of Monongalia, on and between the head of Murley's and Snow Glade Creek, joining the head line of Maryland, including the marsh, &c."

All of these patents, granted by Virginia shortly before the running of the Deakins line, call for this Maryland line.

Virginia Grants After 1789.

After the Deakins line was run, beginning at the Fairfax stone, we have grant by Virginia to Francis Deakins for 9000 acres, dated June 21st, 1794, based on a survey made November 19th, 1792. This 9000 acres covers the territory including the Fairfax Stone. The patent is found on page 1860 of the Record, and has the following calls:

> "Beginning at a bounded sugar tree standing S 4 1-2 degrees E. 180 poles from Fairfax's Stone at the head of the N. branch of Potowmack, and running E. 70 poles N. 100 poles, W.30 poles N. 316 poles, W. 52 poles to the Maryland line, and with it N. 80 poles to a maple marked 1 standing at the end of one mile on the Maryland line run from Fairfax's stone aforesaid, then N. 200 poles S. 73 degrees W. 124 poles to a pine and birch."

It will be remembered that this maple, one mile North of the Fairfax stone, is the beginning corner of Deakins Military lot No. 1101, where Mr. Monroe found an old maple down and a stone marked with the figures 1101.

There was also a patent to Francis and William Deakins for 6310 acres, granted October 31st, 1797, on a survey made August 2nd, 1795—"Monroe Exhibit 65". (Record, page 1859.) This calls for other tracts of Francis and William Deakins, and, among other calls, has the following:

> "N. 73 degrees E. 124 poles to the Maryland line as run from Fairfax's stone fixed for the head of the North branch. Thence with the Maryland line N. 760 poles to a chestnut tree marked for the four mile tree on the said line & also to the 9th line of Deakins' tract of two hundred & fifteen acres, & with it reversed S. 50 degrees W. 50 poles &c."

On top of a portion of this survey was afterwards located patent to Wilson, Byrne and Morris, for 600 acres, dated February 1st, 1854, on a survey made April 27th, 1853. This calls for a tract of land lying on the head of Yough River on the North branch of the Potomac and joining the Maryland line, and has the following call:

> "Beginning at pointers on the Maryland line and corner to John Hoye's, deceased, 72 acres; thence with line of same, etc."

a number of courses, and then the last two courses are as follows:

> "E. 125 p to the Maryland line; with the same S. 514 p. to the beginning."

This takes us to the four mile stone.

The Francis and William Deakins survey for 215 acres, patented in 1794, calls for the Osborne survey, but does not call for the Maryland line. It seems to have run East of the Maryland line as located in the Osborne and Pettyjohn surveys and in the Deakins 9000 acres and 6310 acres.

There was also a patent granted to John Hoye, which lies just South of the Wilson, Byrne and Morris 600 acre survey. It is dated December 31st, 1844. (Record, page 486.) It has the following call:

> "Beginning at a large maple and pine on the bank of the North branch of the Potomac, on the Maryland line, thence N 240 p with the Maryland line, &c."

The territory above the Deakins 215 acres, on the West Virginia side is covered by the Osborne and two Pettyjohn surveys and the Goff 900 acres, 868 acres and 500 acres and the Deakins 200 acres, which all call for the Maryland line, and were granted prior to the running of the Deakins line.

Then North of the Ashby 300 acres, above mentioned, we have the John Hoye patent for 500 acres, dated March 30th, 1843, on a survey dated August 31st, 1842. It describes the land as adjoining lands of William Ashby's survey for 200 acres and William Ashby's survey of 300 acres, now Conrad Nine, and adjoining the Maryland line, &c. Among its calls is the following:

> "N 88 1-2 E 12 poles to the Maryland line, and with it S 198 poles to a stake in the line of William Ashby's survey of 300 acres."

The William Ashby survey of 200 acres and of Hooker for 2251 acres have a corner on this Maryland line, but it is not called for, and the Hooker extends over into Maryland, having been granted before the running of the Deakins line. Part of this Hooker is now owned by Benjamin Miller, and his house is shown by the word "Miller" and a square dot North of the two mile point and just

between the Miller and Deakins line, and his deed conforms to the Deakins line.

The next patents are the two Deakins patents for 908 and 350 acres, granted in 1785. Then comes the Jesse Ashby survey of 400 acres, granted in 1784. These patents have been mentioned above.

The next is the Bacorn patent for 500 acres. It is dated May 18th, 1793, and is based on a survey made May 19th, 1788, and is found on page 1525 of the Record. It describes the 500 acres as "adjoining the Maryland line."

There is also a deed from Eliza Holme to James Brown, (Page 1787) for a portion of this land, made in 1875, which has a call:

> "East eighty (80) poles to a stake in the glade and in the Maryland line; thence leaving Fahey's land and running along the State line North sixty (60) poles to a stake in the glade &c."

And we have also a deed from Edwin Long to Dennis Glover, for a part of this land, which calls to begin "at a stake in the Maryland line and running thence from said line West 80 poles to a stone heap; thence South 200 poles to a hickory; thence East 80 poles to a Maple Tree, in the Maryland line; thence with said line N. 200 poles to the beginning."

The next is Francis and William Deakins' patent of 6000 acres. This, as we have seen, calls to join the head line of Maryland. It was granted September 27th, 1789—"Brown Exhibit 77". (Record, page 824.)

The next is the Martin and Hoye survey for 3600 acres, found on page 1791 of the Record. It was made November 16th, 1800, and describes the land as adjoining the Maryland line, lands of William McClery and Henry Banks, near the Pine Swamp corner of William McClery settlement survey of 400 acres, and it has the following call near the end:

> "With a line of a late survey of said Banks south 1280 ps. to intersect a line of a Survey of Fras. & Wm. Deakins & with it East 380 ps. to the Maryland line and with it North 1550 to intersect McC-eery's line and with it West 188 ps. to the beginning."

The several tracts covering the Diadem, granted by Virginia,

seem to have been granted without reference to the Maryland line.

Next is the Bank's 8000 acre patent—"Monroe Exhibit 26" (Record, page 1806). It is dated July 27th, 1805, on a survey made October 24th, 1799, and it is said to join the Maryland line and lands of William McClery at Pine Swamp, &c, and it has this call:

> "Colonel McCleery lines 784 poles crossing Pine Swamp run and some other drains to 5 white oaks in the Maryland line and with its N. 1780 to a double chestnut by the new road then W. 80 poles to three white oaks, &c."

The next is the Francis and William Deakins tract of 500 acres, just South of the Elder Spring, and adjoining it. This tract does not call for the line, but has a line South 424 poles, which is the line located by Mr. Monroe, and evidently corresponds with the Eastern line of the Banks 8000 acres, and was regarded as on the Maryland line. Neither of the Deahl tracts call for the State line, but they are located as indicated by Mr. Monroe.

We come now to Spurgin's two tracts; one called "Whipperwill", in Maryland for 177 acres (Record, page 1810); and the other for 240 acres in Preston County, West Virginia. (Record, page 1811.) The Whipperwill, granted by Maryland, is dated July 19th, 1842, and has the following call:

> "Beginning at a bounded Spanish oak tree standing on the line said to divide the State of Maryland from the State of Virginia and about one-half mile Westward of James James' dwelling house," and then by several courses and distances back "West two hundred and three perches to the aforesaid line, which is said to divide the State of Maryland from the State of Virginia, then by a straight line to the beginning."

And the 240 acre patent is dated October 21st, 1837, and it calls:

> "Beginning at a chestnut 8 poles North of the beginning corner to said Spurgeon's Maryland Whipperwill survey & running thence S. 204 poles to a stone pile"

and various courses to the beginning.

Next is the Isaac James patent for 220 acres, dated November

28th, 1839 (Record, page 484). It describes the land as lying along the Maryland line, bounded as follows:

> "Beginning at a black oak in said line and the beginning corner of a survey made for Daniel Guffy, &c,"

then several courses and distances to a stake in said State line, "and with the same N. 295 p. to the beginning."

There is a small patent to Dan Griffith for 31 acres (Record, page 1985), dated August 31st, 1836, on a survey made in 1833. It describes the land as joining the Maryland line where said road crosses, and bounded as follows:

> "Beginning at a black oak supposed to be in or near the Maryland line, near the Silverport road, &c."

The Joseph Fearer tract of 119 acres, which extends beyond the line as claimed by West Virginia, does not call for the State line.

The Van Sickle tract of 100 and 120 acres, respectively, do not call specifically for the State line, but they each have a line running North and South, which, according to the holding and location corresponds with the line as heretofore shown. Neither the Robinson 100 nor the Fike 388 acres call for the line. They both extend further East than where the line is supposed to be.

Then comes the Samuel Boger patent for 80 acres. It is found on page 1835. It is dated May 1st, 1860, on a survey made September 11th, 1859. It describes the land as lying in Preston County, adjoining the Maryland line, Abraham Thomas and others, and it has this call:

> "N 79 E 8 poles to a stake in the Maryland line, thence with the same N. 154 poles to a stake in Abraham Thomas' line, &c."

We then have the Luddington 106 acres. (Record, page 1832). It calls to begin "at a stone, corner to Jacob Thomas' survey of 100 acres, and running thence with the second line of the same reversed E. 100 poles to a stake and small Spanish oak, thence S. 120 poles to a small black oak, &c."

Then we have Jacob Thomas patent for 100 acres, in the Northeast corner of West Virginia, adjoining Pennsylvania and Maryland, granted in 1837, which we have mentioned heretofore.

All of this shows that the state of Virginia granted all these lands, both before and after the running of the Deakins line, up to this due North line from the Fairfax Stone. In two or three instances after 1789 these grants extended slightly Eastward of this line. It would seem that this was done by a mistake, but whether or not, there were only two or three instances of it.

Maryland, after 1789, made no grants West of the Deakins line until after the Michler line was run. No grants have been produced made by the State of Maryland after the running of the Deakins line in 1789 extending westward of that line, until after the Michler line was run in 1859, but there are several grants during this period by the State of Maryland that recognize this line running North from the Fairfax Stone as the boundary line, or at least conform to it. We mention the following:

The tract called "Siege of Acre" for 1831 1-4 acres was granted to George Templeman and James W. McCulloh, December 4th, 1839, on a survey made August 27th, 1838. It has the following call:

> "Beginning for the outlines of the whole at a bounded maple standing one mile North from a stone fixed by Lord Fairfax for the head of the North branch of the Potomac River, it being also the beginning tree of Lot No. 1101, and running thence with the first line of each of Lots No. 1101 and 1102, North one hundred and seventy-nine perches" by courses and distances to the beginning. (Record, page 1972.)

The State of Maryland has introduced into this case, and Mr. Brown has laid down upon his map a tract of land granted by the State of Maryland called "Siege of Acre Resurveyed." (See his report, page 969). This is filed as "Exhibit Brown 82" (Page 880). And Mr. Brown has located it as running over to the Michler line. The call is:

> "Beginning for the outlines of the whole at a stake standing West eight perches from the end of the first line of lot Eleven hundred and two and on the dividing line between the States of Maryland and West Virginia, as now recognized and established, one mile and one hundred and seventy-four and a half perches, North from Fairfax Stone, and running thence on said line with a variation of two and one quarter degrees to the right, North, five hundred perches &c."

This resurvey was made the 22nd of April, 1887, just before this suit was brought, and Mr. Brown testifies as to the location of this Sieze of Acre Resurveyed, (See page 1172.) The uncertainty of the location is made manifest by the cross-examination. (Record, pages 1177 to 1183). This Siege of Acre Resurveyed simply adds 35 acres to the original patent of Siege of Acre, and Mr. Brown testifies on page 1180 as follows:

> "Q. 53. Do you know where that 35 1-2 acres of vacant land lay as taken into this resurvey?
> A. Only by supposition; I know by supposition.
> Q. 54. What is your supposition?
> A. It would be on the Western portion of the tract.
> Q. 55. East of the Michler line?
> A. The whole tract is East of the Michler line.
> Q. 56. And this 35 acres would be lying along that Michler line?
> A. I do not know it for a fact because I haven't seen the patent of 'Siege of Acre'; I do not know what that might cover."

Mr. Brown admits that on page 1182, when, in order to reach the Michler line, which he assumes was meant by the dividing line between the States of Maryland and West Virginia, he had to lengthen the line of the survey as given in the patent.

There is also filed in this cause, by State of Maryland, a patent for a tract of land called "Troas Resurveyed" for 933 1-4 acres, patented June 2nd, 1896, long after this suit was brought. This is found on page 888. The grant is to Richard S. McCulloh and Daniel E. Offutt, and it calls to run 145 perches to a post and stone pile on the Michler State line dividing the States of Maryland and West Virginia.

We have the Maryland patent for Buckdale, granted to Jesse J. Ashby, March 21st, 1867, on a resurvey of certain of the Military lots made November 18th, 1848. This has a call as follows:

> "Beginning for the outlines of the whole at the original beginning of lot No. 319, it being the end of the third line of lot No. 318, &c;"

then a number of calls to the following:

> "South 43 degrees West 202 perches to a *white oak sapling standing on the Virginia line, as shown by*

William Ashby, and with said line South 60 peches, &c."

This Buckdale is opposite the small William Ashby survey adjoining his 300 acre survey.

We then have the Maryland patent for Eelshine, containing 79 1-2 acres, lying between Buckdale and Ninesburg and the Ashby patents. It is dated February 28th, 1854, on a survey made January 5th, 1849. The grant is to Archibald Chisem, and it contains the following language:

> "Beginning at the end of the first line of lot No. 316, and running thence South 26 degrees West 90 perches to the Virginia and Maryland line, then with said line North 384 perches to a bounded sugar tree &c."

We then have the Maryland patent called "Ninesburg", to Conrad Nine, a copy of which we are unable to find in the Record, but it covers that part of the William Ashby survey, which lies in Maryland east of the Deakins line, and runs with the Deakins line, as shown on Mr. Monroe's Map No. 2.

We then have the Maryland patent for the tract of land called "Maryland", for 130 1-4 acres, granted to Conrad Nine, January 23rd, 1823, on a survey made August 10, 1810. Among other calls it has the following:

> "N 60 degrees W 95 perches to the Virginia and Maryland line as run by the direction of Francis Deakins at the time of laying out the lots to the Westward of Ft. Cumberland; thence running with the said line N 210 perches, thence by a straight line to the beginning."

This tract is located just opposite the John Hoye 500 acres, and adjoins the Deakins line as located by Mr. Monroe.

We then have farther North on the Cherry Hill survey, so far as it lies in Maryland, the Maryland patent for Whipperwill tract, for 177 acres, patented July 19th, 1842, on a survey dated May 7th, 1835. This is "Monroe Exhibit No. 30." (Record, page 1810). The grant is to Jesse Spurgin, who took out the patent in West Virginia opposite, for 240 acres, as we have already seen. It contains this language:

> "Beginning at a bounded Spanish oak tree standing on the line said to divide the State of Maryland

from the State of Virginia and about one half mile Westward of Jame's Dwelling House, &c."

We then have the Maryland grant to Thomas Hammond for a tract called "Hammond's Corner," dated the 5th of September, 1842, on a survey made January 9th, 1839. It has the following call:

> "With part of the third line of lot No. 2927 North 565 perches to the Pennsylvania line, and with it West 48 perches to the Fairfax line, commonly called the Virginia line, and with said line South 565 perches and then by a straight line to the beginning."

Also Maryland patent for "West Point" calls for the 3 mile tree on the line drawn North from the head of the North Branch of the Potomac River. This Lieutenant Michler's Report is dated in 1793.

Lieutenant Michler ran the line, which bears his name, in 1859, being employed to retrace the boundary line from the Fairfax Stone by Commissioners McDonald and Lee, acting under the authority of the Legislatures of Virginia and Maryland respectively. His report is found in the Record, pages 830 to 847 inclusive. He first visited the Fairfax Stone September 19th, 1858, in company with several gentlemen. (Page 830). And on the 17th day of June, 1859, he went to Fairfax Stone again for the purpose of beginning the work of running the line. He had no difficulty in finding and recognizing the stone. (Page 843.) He describes it as follows:

> "The initial point of the work, the oft mentioned, oft spoken of 'Fairfax Stone' stands on a spot encircled by several small streams flowing from the springs about it; it consists of a rough piece of sand stone, indifferent and friable, planted to the depth of a few feet in the ground, and rising a foot or more above the surface. Shapeless in form, it would scarce attract attention of the passer by; it was found without difficulty and easily recognized by the inscription upon it Ffx, now almost obliterated by the corroding action of water and air."

He then describes the manner in which he ran the line by as-

tronomical observations, stationed on the high altitudes, and the manner in which he marked various stations along the line.

The existence and location of the old boundary line, as recognized by the inhabintants is shown by Lieutenant Michler's report; and that it was then recognized and held to substantially in the same manner as has been shown in this cause, clearly appears from the following language in his report, page 845:

> "The Meridian as traced by me last summer, differs from all previous lines run, some varying too far to the east, others too far to the west. The oldest one, and that generally adopted by the inhabitants as the boundary line, passes to the east, and from measurements made to it, I found that it was not very correctly run.
>
> The surveyor's compass was used for the purpose, and some incorrect variation of the needle allowed. Owing to the thick and heavy growth of timber it is utterly impossible to run a straight line correctly through it without first opening a line of sight; it could only be approximately done. When north of the Railroad, and nearer the Pennsylvania Line is approached, the settlements and farms become more numerous, and if the meridian line is adopted as the boundary it will cause great litigation, as the patents of most of the lands call for the boundary as their limits. On the Pennsylvania Boundary the new line is about three quarters of a mile west of the old, on the Railroad — feet; at Weillsfield 85 feet; on the North West Turnpike about 40 feet, and on the Backbone about 20 feet."

Maryland Survey of "West Point".

Mr. W. McCulloh Brown has stated in his report, page 968, that he located the thirteenth, fourteenth, and fifteenth lines of a tract called "West Point", and from his location of these lines he located the two recent surveys of "Seige of Acre Re-surveyed" and "Troas Re-surveyed." His purpose in locating the three lines of West Point was to find the common lines between that survey and the other two recent surveys just mentioned. His location of this West Point survey is one of the most extraordinary pieces of surveying that we have come across. The patent for West Point was granted by the State of Maryland June 24th, 1793. It is found on page 878 of the Record. The beginning is described as follows:

> "Beginning at a bounded white oak, cucumber and maple standing North sixty two and a half degrees East 363 perches from the three mile tree on the line drawn North from the head of the North branch of the Potomac River, and on the East side of a ridge called the Backbone, which divides the Eastern and Western waters, and running thence North 50 degrees East 22 perches, etc."

Mr. Brown, instead of locating this tract by finding the beginning corner, as called for in the survey, which was easily done, by getting the three mile tree or point on the line drawn North from the head of the North branch of the Potomas River, and then running the line from that point as called for, North sixty-two and a half degrees East three hundred and sixty-three perches, made no attempt to find the beginning, but made his location from a chestnut stump pointed out to him by some man by the name of Wilson, which bore no marks or other evidence of having ever been a corner tree. Now it is manifest that this West Point survey was located by the Deakins line run to the Fairfax Stone in 1789, about three years before this survey for West Point was made. It calls for the three mile tree on a line drawn North from the head of the North branch of the Potomac. Deakins survey shows that he had laid this line off into mile lengths and marked the trees or put up other monuments at the end of each mile, so that there could be no difficulty in locating this West Point survey in this way. Mr. Brown found nothing indicating that this land had ever been located in the way he places it, and had nothing to base it on, except the statement of this man Daniel W. Wilson. He describes, on pages 1172 and 1173, how he located these three tracts of West Point, Siege of Acre Re-surveyed, and Troas Re-surveyed.

On cross-examination, found on pages 1177 to 1183, inclusive, Mr. Brown admits that his location of the beginning of the West Point survey at T on his map is at least 57 poles too close to the Michler line, according to the original description in the patent, and it would be a little closer still to the old line. He also admits that he did not atempt to locate the original patent "Siege of Acre", although the re-survey of the Siege of Acre is based upon this old patent. He also admits that he did not attempt to find the beginning corner of the "Siege of Acre Re-surveyed". (See page 1180.) This beginning corner is said to be a stake standing West 8 perches from the end of the first corner line of lot 1102, on a dividing line

between the States of Maryland and West Virginia, as now recognized and established, and one mile and 174½ perches North from the Fairfax Stone. He admits that he did not try to locate this lot 1102, nor to find the point one mile and 174½ perches North from Fairfax Stone. He chose to rely only on the unsupported statement of some one on the ground, that a certain chestnut, unmarked, then lying down, was the end of the thirteenth line of the tract. To our minds it is clear that this location of West Point is unsupported by anything in the papers or any satisfactory testimony in the case, and these locations of the recent surveys of Siege of Acre Re-surveyed and Troas Re-surveyed are purely arbitrary. Mr. Brown admits that, in order to make the location, he had to extend the line to 132 poles to reach the Michler line. (See page 1182.)

Maryland Survey of "White Rock."

We believe the only other Maryland survey located by Mr. Brown is that of "White Rock," containing 1180 acres, 2 rods and 30 perches, granted by the State of Maryland to Notley B. Browning, December 23rd, 1881. This patent is found on pages 889 and 900 of the Record. Mr. Brown states in his report, page 970, that he located it at a small planted stone pointed out to him by J. D. Browning, designated on his plat by the black letter "Y". This tract of land lies between the Michler line and the Deakins line and covers the territory between these two lines for a distance of 1180 poles, and is manifestly one of the surveys taken by citizens of Maryland after the Michler line was run, to endeavor to acquire title as against the Virginia patents for the land lying between the two lines, which had never, prior to that time, been covered by a Maryland grant. This is the same territory coverd by the Henry Banks patent of 8000 acres, granted by the State of Virginia, July 27th, 1805, on a survey made October 24th, 1799, just after the Deakins line was run, and was a part of the Crane estate on which old Mr. Crane lived, as we have heretofore shown, and has always been in possession of those claiming under this Banks 8000 acre patent. It is upon this land that the houses of Savage, Sisler, Reckard and Sines are located, where they have lived for years as testified to by them, heretofore shown in this brief.

Maryland Patents Since Michler Line was Run.

We have thus shown beyond question, we think, that the State of Maryland never granted any part of the territory lying West

of the Deakins line, based upon any survey made after it was run in 1789, until after the Michler line was run in 1859. After that line was run. Maryland has shown in this case that she made grants of the White Rock survey, lying between the two lines entirely, to Notley Browning, in 1881, and of the two tracts "Siege of Acre Re-surveyed", dated in 1887, and "Troas Re-surveyed", dated in 1896, which is after this suit. So that only two surveys had been granted in this territory prior to the bringing of this suit since 1789 by the State of Maryland. The whole purpose of the re-surveys of Siege of Acre and Troas was to add to the old patents, Siege of Acre and Troas, the territory lying between the old line and the Michler line, which had never heretofore been embraced within a Maryland patent. But no possession has ever been taken of any of this territory between the lines under these recent Maryland patents. The case of the Preston Lumber & Coal Company, as testified to by Mr. H. J. Frear, pages 1620 to 1624, is no exception to this statement. In that case Mr. Frear shows clearly that the Preston Lumber & Coal Company bought the timber, and, in some instances, the land on both sides of these lines, so that no question can arise as to the ownership of the timber between the lines. (See especially page 1623.) This was after this suit was brought as late as 1901, 1902 and 1903, so that it would have no effect upon the questions involved in this case. Prior to the bringing of this suit, no possession of any kind had been taken or held under any of these Maryland patents, except in the case of a small portion of Elder Spring, as heretofore pointed out.

The Indictment and Prosecution of Marshall Reckard in Garrett County, Maryland.

The State of Maryland has introduced into this case the record of the indictment and prosecution of Marshall Reckard in the Circuit Court of Garrett County, Maryland, in 1886 and 1887, shortly prior to the bringing of this suit. This record is found on pages 979 to 986. From this record it appears that Marshall Reckard was indicted for felonious assault, with intent to kill, committed upon Austin Brown, and the venue was laid in Garrett County, Maryland. The defendant tendered a plea in abatement (Page 982) to the effect "that the said supposed offense, if any were committed, was not committed within Garrett County, nor within the jurisdiction of this Court, but in the County of Preston, in the State of

West Virginia." Issue was joined upon this plea, and a jury was sworn to try this issue. The defendant asked Court to instruct the jury as follows:

> 1. The traverser by his counsel prays the Court to instruct the jury that if they find from all the evidence in this cause, that there was a line known as the old Maryland line, and that said old Maryland line had been surveyed prior to the year 1859, and that the entire territory of Md. and Garrett County lie east of said line, and shall further find that said line was recognized, acquiesced in and acted upon in the issuing of grants for lands by the States of Virginia and Maryland, respectively, as the boundary line between said States, and that the point or place where the alleged offence was committed is West of said line, then the jury may find for the defendant, unless the jury further find that the States aforesaid have concurrently laid out, ratified and adopted a line other than said Old Maryland line. (Rejected.) (Record, page 983.)

But the Court rejected this instruction and also rejected an instruction that they should find for the defendant, unless the line between West Virginia and Maryland had been ascertained according to law before the offense was committed, and that said offense was committed in Garrett County according to the line so established and ascertained by law. The Court also refused to instruct the jury that if they found that a line had been marked and surveyed in 1859 as the boundary line between the States, the proceeding were a nullity unless this line had been adopted and ratified by both Maryland and Virginia. But the Court did give the extraordinary instruction, on page 984, that the burden of proof was upon the defendant or traverser, as he was called, to show affirmatively that the place at which the offense was charged in the indictment to have been committted, was not in Garrett County, Maryland, "and unless he shall do so by such affrmative proof, the jury must find for the State of Maryland, notwithstanding the jury may further find that there have been and are disputes about the question as to the claims of the State of Maryland, to that territory between individuals in the neighborhood in respect to the lands lying within said disputed territory." And the Court instructed the jury that if they found the place was East of this Michler line run in 1859, they must find for the State. So that this simply amounts to a

decision by the Circuit Court of Garrett County, Maryland, that the territory East of the Michler line was presumed to be within Garrett County, Maryland, and that the burden of proof was upon the defendant to show otherwise. In connection with this record the State of Maryland introduced the testimony of Austin Brown. He is the party assaulted.

It seems that he was a constable in 1886, and had a warrant against Marshall Reckard for stealing hogs, issued by a Justice of Garrett County; that he went after Reckard and Reckard resisted him and hit him with a double headed axe; but, with the assistance of a man by the name of Faulkner, they finally arrested him and he was tried, as shown in the record, above mentioned. And this man Brown pointed out to Mr. W. McCulloh Brown, the surveyor in this case, the point on the ground where this assault occurred. That point is designated by the letters "*W R*" on the map of Mr. Brown, filed in this cause, and by the same letters and a dot with a circle around it on Mr. Monroe's map, just above the words "J. A. Reckard" on the map. It appears that this arrest was made upon a charge that Reckard had stolen the hogs of a man by the name of Friend, living in Garrett County, Maryland, more than two miles from the Michler line, so that there was no question but what the offense, for which he was arrested, was committed in Garrett County, Maryland. We have shown by the testimony of Mrs. J. A. Reckard, the Savages and Sisler that this point "W R," where this assault was committed, is about midway between the Michler line and the old line as claimed and held by the citizens in that locality; that the territory is covered by the Banks 8000 acre patent shown on Mr. Monroe's map, and that J. A. Reckard and those living in that neighborhood claim their titles under Virginia and West Virginia, and have always done so; that the State of Maryland has never collected any taxes, worked the roads or exercised any jurisdiction whatever in this territory; the only instance of the appearance of the exercise of jurisdiction being this indictment and conviction of Marshall Reckard. By this single act of the Maryland constable crossing over the line to arrest a man, it cannot be said that the exclusive, long continued jurisdiction of the State of West Virginia was interrupted or interfered with any more than if the assault had occurred in Jefferson County, West Virginia, and the Maryland Court had refused to inquire into the question of the State line.

That kind of a question could not be tried in a State Court properly, but the case should have been removed to the United States Court, where the question would have come up fairly before a disinterested tribunal.

Certain Deeds Introduced by Maryland.

The State of Maryland has introduced, in addition to the patent for the Royal Charlotte, a portion of which lies West of the Deakins line, as heretofore shown, a deed made in 1789, from Thomas Hall, patentee to Robert Morris, conveying this tract among others; a deed from Robert Morris to George and John Graham, dated September 7th, 1797, conveying this tract among others; deed from these executors to Samuel Vincent, Administrator, and others, dated May 26th, 1814, conveying this tract, with others, and a deed from Vincent to William Lorman, dated November 15th, 1816, conveying this tract, with others; a deed from Lorman to Robert Oliver, dated May 1st, 1824, conveying this tract with others; and a deed from Robert Oliver to Charles Oliver, dated *January 10th, 1834*, conveying this tract with others. There are no conveyances after that date, and no significance can be attached to these conveyances because the larger portion of this tract lay in Maryland, and no attempt was made to separate that from the portion lying in Virginia. But no possession was ever taken or held under these deeds, as we have heretofore shown; this portion of the Royal Charlotte being covered, from the earliest times by the patents to Goff and others and held by parties claiming under these Virginia patents. The same thing is true of the Maryland tracts called "Promised Land" and "Thomas & Anne." They all passed ultimately to Robert Oliver, and by him were conveyed to Charles Oliver by said deed of January 10th, 1834, and there the record stops. No part of the "Promised Land" lies within the territory claimed by West Virginia, and we have shown that so far as the "Thomas & Anne" crosses the Deakins line, it is covered by the Bacorn and Ashby patent, and possibly some of it by the Deakins 6000 acres. No possession was ever taken or held under these deeds. The same thing is true of the Maryland tract called "Kindness." It appears that by various conveyances it also passed to Robert Oliver and was conveyed by him to Charles Oliver by said deed of January 10th, 1834. So far as it lies West of the Deakins line it is covered by the Ashby and Deakins tracts,

and on it is situated the village of Huttons Switch, the dwellings of Smith, Felton, Freeland, White and others, all of whom are citizens of West Virginia: this being the territory traversed by the Baltimore & Ohio railroad. Certain deeds are also introduced to show conveyances of a tract called "Diadem;" the last deeds being made in 1839 and 1842 to John Crane. We have shown that this territory is all covered by Virginia patents. It is held by Crane's heirs; by Feathers, Jeffers and the Albrights, and upon it is located the town of Cranesville, quite a village in Preston County, West Virginia, so that whatever title John Crane got under this Maryland patent became merged in the Virginia titles and the land has always been carried as lying in Virginia and West Virginia. See the proof on this point set forth in this brief, pages 134 to 183 inclusive.

The Maryland conveyances relating to this tract of the Diadem are found on pages 704 to 724 of the Record, inclusive. The patent was granted to George R and Thomas Hayward by the State of Maryland, December 3rd, 1791. The Haywards conveyed this tract of the Diadem and another tract called "Wild Cherry" to Mary Bond by deed dated August 1st, 1794. (Record, page 705.) Mary Bond and her husband, William Stoddert Bond, conveyed the Diadem and the tract called "Wild Cherry Tree Meadow" to Benjamin Stoddert September 6th, 1794. (Record, page 708.) Benjamin Stoddert conveyed the following parcels: "Diadem", "Own Delight", "Own Choice", "Own Discovery", "The General's Wish", thirteen of the Military lots, a tract called "Friendship" and 717 acres of a tract called "Good and Bad" to Abram VanBibber, August 6th, 1802. And Abram VanBibber devised this tract called the "Diadem", with a great deal of other property, to Louise Jolley and Sarah Anne Van. Jolley, daughters of William Jolley, by his will dated June 11th, 1805, and probated September 14th, 1805. There were no conveyances of this tract under these Maryland titles from 1805 until 1839, when William I. Wallis, in consideration of $200.00, conveyed the Diadem to John Crane. (Page 722.) And by deed dated September 6th, 1842, Sarah Anne Jolley Campbell conveyed the same tract, with all her right, title and interest in it to John Crane, (Page 721.) so that in 1839 and 1842 the same John Crane, who had held this land under Virginia titles, for a nominal sum, bought in these Maryland titles. But the proof is clear and undisputed that John Crane lived on these lands

between the Michler and the Deakins lines, as shown heretofore; always claimed to be a citizen of Virginia, paid taxes on these lands in Virginia and never in any wise recognized the jurisdiction of the State of Maryland over them, nor did the State of Maryland attempt in any way to exercise jurisdiction.

Mr. W. McCulloh Brown, with his usual zeal and partisanship for the State of Maryland, in his report located certain parcels of land as now held, covering portions of the Diadem, and sought to make it appear that these holdings constituted subdivisions of the Diadem under the Maryland title, in order that the inference might be drawn that the present holders of these lands claim title under the Maryland patent for the Diadem. But, on cross-examination, pages 1052 to 1063, he admits, and it is clearly shown that these tracts which he started out to call sub-divisions of the Diadem, do not conform in any instance in their exterior lines to the exterior lines of the Diadem, but that they lie either entirely within the Diadem, having no common lines with it, or else they extend beyond the lines of the Diadem, embracing portions of the Diadem and portions of adjoining lands, thus making it clearly appear that these were not sub-divisions of the Diadem, but were sub-divisions of the lands of John Crane, deceased, made without any reference whatever to the lines of the Diadem, or to the title derived under it. The final two questions and answers on Mr. Brown's cross-examination make this clear, though it was demonstrated prior to that time in the cross-examination, although he very reluctantly admits it. The last two questions and answers are as follows:

> "Q. I will ask you this, Mr. Brown, if you can state that any of the subdivisions lying west of the line ran by Julius K. Monroe in 1894 and any of the subdivisions of the Diadem conform in their exterior lines or any of them, with the exterior lines of the Diadem?
>
> A. Well, I have not the papers to show, but according to the testimony we have just given, nearly all the tracts extended somewhat beyond the lines of the Diadem.
>
> **Q. They all do unless it is the tract D. D., do** they not, or else lie within it like the tract D. G. wholly, would that be your judgment?
>
> A. As I say, I have not the papers, but that is my idea." (Record, page 1063.)

Possession Under Elder Spring.

The State of Maryland has introduced the Maryland patent for the tract called "Elder Spring," containing 411 acres granted in 1786 to Francis Deakins, and also introduced a number of deeds by which portions of this Elder Spring tract have been conveyed from time to time. These title papers are found in the record on pages 724 to 786, inclusive. They show that Francis Deakins devised this land to his nephew, John Hoye, and that in 1834, John Hoye and wife conveyed the Elder Spring tract, with other tracts to William W. Hoye. William W. Hoye conveyed 111 acres of it off of the South end to Daniel Raymond, and thence by various conveyances finally to Samuel Faulkner, and he conveyed it to his wife, Martha J. Faulkner. (See Record, pages 747 and 748.) This is indicated on Mr. Brown's map by the capital letters "EA." William W. Hoye and wife conveyed to John Kelly 50 acres, by deed dated January 14th, 1833. (Page 749.) This 50 acres passed by mesne conveyances apparently to Jeremiah Bitner. (Page 761.) It is designated on Mr. Brown's map by the letters "EB." William W. Hoye also conveyed to James Ervin, by deed dated June 9th, 1832, 50 acres of this land, and this land with 100 acres additional, which had been conveyed to David Kelly by W. W. Hoye, finally passed to Michael Chriss, and portions of this piece, with some other pieces, passed to Marshall Friend, which is designated on Mr. Brown's map by the letters "EC," and a portion to William Phillips and George Spill and others. This is designated on Mr. Brown's map by the letters "EE" and a portion of it seems also to be owned or claimed by Edward Jones, which is indicated on Mr. Brown's map by the letters "ED."

As has heretofore been stated in this brief, pages 240 and 251 and 252, some of these persons who claim portions of this Elder Spring tract pay taxes on it in Maryland and in one or two instances they vote in Maryland, but this does not apply to the whole tract. Edward Jones, who, as we have shown, owns the part marked on Mr. Brown's map by the letters "ED," being the Northwestern part, extending partly over the Michler line, testifies, on page 1137, that he lives on this part of the Elder Spring tract; that he lives in Virginia, evidently meaning West Virginia; that he owns 100 acres of the Elder Spring tract; that his deed is recorded in Kingwood, and never has been recorded

in Oakland, Garrett County, Maryland. He said before his time, persons who owned the land paid the taxes on 40 acres of it in Maryland and the rest in West Virginia. He testifies that Spills —George and Tom Spills, who own, as we have seen, the part designated by the letters "EE" on Mr. Brown's map, being the Southwestern portion; also pay taxes in West Virginia. Part of their land also extends East of the Michler line. This man Jones votes, as he testifies, in West Virginia. (Page 1138.)

Marshall Friend, who owns the Northeastern portion of the Elder Spring tract, designated on Mr. Brown's map by the letters "EC", does not live on that tract, but lives on the Deahl tract East of it, between the Elder Spring and the old Deakins line. He claims the old Deakins line as the State line. He votes in West Virginia and claims his citizenship in that State, and, although he testifies that he owns 50 acres of this Elder Spring tract, he testifies that the Virginia patents lie all around it, and he holds the title to the other lands under these Virginia titles. His testimony was also taken for the defendant, pages 1481 to 1483, in which he explains the situation very fully. He states, on page 1482, that this 50 acre part of the Elder Spring tract, is assessed for taxes in Garrett County, Maryland, but his land surrounding it and lying East of it, and on which he lives, is assessed in Preston County, West Virginia.

Jeremiah Bitner, who owns that portion of the Elder Spring tract designated on Mr. Brown's map by the letters "EB," testifies, on pages 1141 to 1145, in regard to his title and ownership. He claims 60 acres of this Elder Spring tract and two other pieces, one of 17 acres and one of 15 acres, lying East of it. He votes in Maryland and pays taxes in Maryland on this land.

Samuel Faulkner, whose wife, Martha J. Faulkner, owns that part of the Elder Spring tract, designated on the map by the letters "EA," being the Southeastern portion, testifies that he pays taxes on his land in Maryland, but he shows clearly the existence of the old Maryland line East of the Elder Spring tract and the existence of the Deahl tract of land, on which Marshall Friend lives. (Pages 1149 to 1154, inclusive.)

The result of this testimony is that of the 411 acres originally granted in the Elder Spring tract, 114½ acres owned by Faulkner, 60 acres owned by Bitner and 50 acres owned by Marshall Friend are assessed for taxation and the taxes paid in Maryland. The residue of the tract, amounting to 187 acres, owned by Jones and

Spill, and upon which they live, is assessed and the taxes paid in Preston County, West Virginia, and Jones and Spill claim to reside in West Virginia, and vote in that State. Marshall Friend, who owns the Northeastern part of this tract and lives East of it on the Deahl land, also votes in West Virginia and claims the line to be at the old Deakins line, whilst Bitner and Faulkner claim to reside in Maryland and vote in Garrett County, Maryland, at Friendsville. But these are the only persons residing West of the old Deakins line, except Ethbell Falkenstein, who claims under a Maryland title and who claims to reside and vote in Maryland, and Falkenstein has only done so of recent years. They have had their lands voluntarily assessed in Maryland, and no doubt, as the practice is under the Maryland law, go to the county seat and pay their taxes voluntarily, so that this furnishes no evidence that the authorities of the State of Maryland have actively attempted to exercise jurisdiction in this territory, but only that these two individuals have claimed allegiance to her government and voluntarily paid their taxes to her. Mr. Julius K. Monroe testifies on page 1714 that Samuel Faulkner, Bitner and Ethbell Falkenstein are the only persons living between the lines, who claim allegiance to the State of Maryland. His testimony, found on pages 1713 and 1715 of the Record, is as follows:

> "983rd Q. From all the sources of information which you have what have you to say as to which state, Maryland, or West Virginia, the people living between the Maryland line, and the line Mr. Brown ran, adhere and bear allegiance?
>
> A. State of West Virginia.
>
> 984th Q. And which state exercised jurisdiction over that territory?
>
> A. So far as I know, the state of West Virginia.
>
> 985th Q. The title papers which you examined of all the people along that line run by Mr. Brown—were they West Virginia titles or Maryland titles?
>
> A. West Virginia titles.
>
> 986th Q. Do you know of anybody living west of the Michler line who claims allegiance to the State of Maryland?
>
> A. I do not.
>
> 988th Q. Do you know of any persons living between the Michler line and the old state line who in any way adhere to the State of Maryland?
>
> A. Yes.

989th Q. Who are they?

A. Samuel Faulkner, and a man named Bittner, I think, and Ethbell Falkenstine, to my recollection, are the only persons living between those lines claiming allegiance to the State of Maryland.

990th Q. What tract of land does Faulkner live on?

A. Samuel Faulkner lives on the Elder Spring tract.

991st Q. What tract of land does Bitner live on?

A. I think Mr. Bittner—Jeremiak Bittner, also lives on the Elder Spring. I am not sure about Mr. Bittner, but that is my recollection.

992nd Q. What land does Ethbell Falkenstine live on?

A. He lives on the Diadem—the Crane lands.

993rd Q. Has he any other title except the Diadem to his land?

A. He has no Diadem title that I am aware of.

994th Q. Where does he derive his title from?

A. He got his title from Samuel Crane's heirs, I think.

995th Q. Was Crane's title derived from the State of Virginia?

A. Yes, sir.

996th Q. Has Falkenstein always adhered to the State of Maryland?

A. I understand not. He told me he had not.

997th Q. His title deeds were first recorded, were they not, in Preston County?

A. Yes, sir.

998th Q. And how long since he transferred them to Oakland, Maryland?

A. That I cannot say. I do not know (examines papers). The deed from Crane's heirs to Ethbell Falkenstine for 200 acres of land, that upon which he lives, is recorded in Book 31 on page 21, of the records of Preston County, West Virginia. The date of the deed is November 7th, 1866.

999th Q. Is this the same Ethbell Falkenstine whose deposition was taken in this cause by the State of Maryland?

A. It is.

1000th Q. With reference to his line, where is the point where a red oak tree stands that he pointed out to Mr. Brown as being in the old State line? How is it with reference to his land and his house.

A. It is north-east of his house, and is in or very

near his eastern boundary line. It is designated on the map by a small circle and black 'WK'."

The Michler Line.

Having shown, as we confidently believe, that the first fountain of the Potomac River is properly located at the head of the North branch rather than the South branch, and that the Fairfax Stone correctly and properly marks the head spring or first fountain of the North branch of the Potomac; having shown the planting of that stone in 1746, and that after the Revolution Maryland appointed and directed Francis Deakins to lay out all of her ungranted land West of Fort Cumberland into 50 acre lots as bounty lands for her Revolutionary soldiers, and that Deakins located these Military lots along what he regarded and represented to be a due North line from the Fairfax Stone; that prior to the location of these Military lots and the running of this line by Deakins, various surveys had been made and quite a number of patents granted by the State of Virginia calling for this due North line, and that after it was run the State of Maryland never made any further grants extending Westward of that line, but the State of Virginia made a considerable number of grants, extending up to and conforming to that line, according to their calls and courses and distances; having shown that this old line, known as the boundary line between Virginia and Maryland, is well known and marked and defined upon the ground, a large number of points and objects, natural and artificial being pointed out and located in the surveys and reports and evidence in this cause, by which it can be easily and accurately run and located, conforming in nearly every instance to the holdings of the inhabitants under the Virginia patents, as well as under the Maryland grants on that side, and having shown that all the territory up to this line has for more than a century been held under these Virginia patents, and that the State of Virginia has, in every way, known to government, exercised jurisdiction over the territory, and that all of the inhabitants West of this line have recognized their allegiance to the State of Virginia and West Virginia, except two persons claiming a portion of the old Maryland patent called "Elder Spring," and recently one person claiming a part of the Diadem. And it appearing that in 1859 a line was run due North from the Fairfax Stone to the Pennsylvania line by Lieutenant Michler, it is proper to inquire what the effect of the running of this Michler line would have upon this

controversy. But for the running of this line there can be no question, it seems to us, that the Court would hold that the boundary line should be established on this old Deakins line according to the ancient possession and exercise of jurisdiction by the States of Virginia and West Virginia, under the familiar doctrine heretofore adopted by this Court in controversies between States, relating to their boundary lines. It remains then to inquire whether there is anything in the running of this Michler line which would prevent such a decision.

We have heretofore shown the State of Virginia had always refused to negotiate even with the State of Maryland for the settlement of her boundary lines, except upon condition that Maryland would abandon her pretentions to go to the head of the South branch of the Potomac. Finally in 1852, the legislature of Maryland yielded this point definitely and on the 27th day of May, 1852, passed an act in the following language, found on page 601 of the Record:

> "An Act for Running and Marking the Western Boundary Line of this State.
>
> Whereas, it is of great importance, that the Western territorial limits of the State of Maryland be clearly defined, and her boundaries permanently established, and whereas, the true location of the western line of Maryland, between the States of Maryland and Virginia, beginning at or near the Fairfax stone, on the north branch of the Potomac river, at or near its source, and running in a due north line to the State line of Pennsylvania, is now lost and unknown, and all the marks have been destroyed by time or otherwise; and whereas, the States of Virginia and Maryland have both granted patents to the same tracts of land, at or near the supposed line, and as suits of ejectment are now pending in the Circuit Court for Allegany County, in the State of Maryland, by persons holding under Maryland patents against persons now in possession and holding and under patents granted by the State of Virginia, which cannot be justly settled without establishing said boundary line; Therefore,
>
> Section 1. Be it enacted by the General Assembly of Maryland That the Governor be, and he is requested to open a correspondence with the Governor of Virginia, in relation to tracing, establishing and marking the said line, and in case the Legislature of

Virginia shall pass an Act providing for the appointment of a Commissioner to act in conjunction with a commissioner on the part of Maryland, in the premises, then, and in such case, the Governor, be, and is hereby authorized and required to appoint a commissioner, who, together with the commissioner who shall be appointed on the part of Virginia, shall cause the said line to be accurately surveyed, traced and marked with suitable monuments, beginning therefor at the said Fairfax's stone, and running thence due north, to the line of the State of Pennsylvania.

Sec. 2. And be it enacted, That it shall be the joint duty of the commissioners, after running, locating, establishing and marking the said line, to make a report, setting forth all the facts touching the locating and marking said line; and it shall be the duty of the commissioners of each respective State, to forward copies of the joint report to each of their respective Legislatures; and upon the ratification of such report by the State of Virginia and the State of Maryland, through their respective Legislatures, the said boundary lines shall be fixed and established so to remain forever, unless changed by mutual consent of the said States."

Approved May 27th, 1852.

The State of Virginia took no action upon this matter until 1858, when the legislature, on March 26th of that year, passed an act in the following language, found on page 600:

"An Act to Ascertain and Fix the Boundary Lines of the States of Virginia and Maryland.

Passed March 26th, 1858.

Whereas, The General Assembly of Maryland has passed two Acts for running and marking the boundary line between that State and the State of Virginia, beginning therefor at Smith's Point at the mouth of the Potomac river, and running thence to the Atlantic Ocean, to form the eastern line, and beginning at the Fairfax stone on the Potomac river, sometimes called the North Branch of the Potomac river, at or near its source, and running thence due north to the line of the State of Pennsylvania, for forming the western boundary line; and whereas, the Legislature of the State of Maryland has requested the appointment of a Commissioner on the part of

this State, to act in concert with the Commissioners of Maryland, to run, ascertain and mark the said lines, therefore.

1. Be it enacted by the General Assembly of Virginia, That the Governor, be and he is hereby authorized and required to appoint as soon as may be a Commissioner, who together with the Commissioner who may be appointed on the part of Maryland, shall cause the said lines to be accurately surveyed, traced and marked with suitable monuments, from Smith's Point at the mouth of the Potomac river to the Atlantic Ocean, and from Fairfax stone, situated as aforesaid to the Pennsylvania line as aforesaid.

2. It shall be the duty of the Commissioner on the part of the State of Virginia, after the running, locating, establishing and marking the said lines, to make a joint report with the Commissioner, on the part of Maryland, setting forth all the facts touching the same, and to forward a copy of said joint report to the Legislature of Virginia; and upon the ratification of such report by the Legislatures of the States of Maryland and Virginia, the said lines, thus run and ascertained, shall be fixed and established; to remain forever, unless changed by the mutual consent of the said States of Maryland and Virginia.

3. Be it further enacted, That an adequate compensation be allowed by law, upon an order of the Executive, to said Commissioner, to be paid out of any funds in the treasury not otherwise appropriated.

4. This Act shall be in force from its passage."

In relation to these acts, it is well to observe, first, that the Maryland act recites that the true location of the Western line of Maryland between the States of Maryland and Virginia, beginning at or near the Fairfax Stone, on the North branch of the Potomac River, at or near its source, and running in a due North line to the State line of Pennsylvania, *is now lost and unknown, and all the marks have been destroyed by time or otherwise,* and requests the Governor to open correspondence with the Governor of Virginia "in relation to *tracing, establishing and marking said line,*" and the appointment of a Commissioner, "who shall cause the said line to be accurately surveyed, traced and marked with suitable monuments, beginning therefor at the Fairfax Stone and running thence due North to the line of the State of Pennsyl-

vania;" which language clearly indicates that the purpose was to trace and locate upon the ground the line, which had previously existed, but the evidence of which had become lost and destroyed by time and otherwise. It was not intended to establish a new line, but merely to find the old one and mark it, and the language of the Virginia act also bears this interpretation. The Governor of Virginia was authorized to appoint a Commissioner, who, together with the Maryland Commissioner "shall cause the said lines to be accurately *surveyed, traced and marked* with suitable monuments .....from Fairfax Stone, as aforesaid, to the Pennsylvania line, as aforesaid", and then providing, after running, locating, establishing and marking said lines, the Commissioners should make a joint report to the Legislature of Virginia, and upon the ratification of such report by the Legislature of both States, the said lines thus run and ascertained shall be fixed and established and remain forever, unless changed by the mutual consent of both States.

Under these acts, Angus McDonald was appointed Commissioner on behalf of Virginia, and Thomas J. Lee, on behalf of Maryland. They secured from the War Department the services of Lieutenant Michler, and they instructed him "to proceed to Fairfax Stone, at the head of the North branch of the Potomac, as ascertained and identified by us on the 19th September last, and prosecute, as far as the season will permit, such astronomical observations as may be requisite to determine the direction of a meridianal line from this point to the Pennsylvania line." (Record, page 380.) After doing certain work upon the Southern boundary, Lieutenant Michler proceeded to establish, by careful astronomical observations, the meridianal line from Fairfax Stone to the Pennsylvania line. His report is found on pages 381 to 397, inclusive. He marked this line by erecting stone monuments at prominent points along it. In running this line, Lieutenant Michler evidently took observations of the location of the old line and he says that his line differed from all previous lines that had been run. He uses this language on page 394:

> "The oldest one, and that generally adopted by the inhabitants as the boundary line, passes to the east; and from measurements made to it I found that it was not very correctly run. The surveyor's compass was used for the purpose, and some incorrect variation of the needle allowed. Owing to the thick

and heavy growth of timber, it is utterly impossible to run a straight line through it without first opening a line of sight. It could only be approximately done.

When north of the railroad, and the nearer the Pennsylvania line is approached the settlements and farms become more numerous; and if the meridian line is adopted as the boundary, it will cause great litigation, as the patents of most of the lands call for the boundary as their limits. On the Pennsylvania boundary the new line is about three-quarters of a mile west of the old; on the railroad — feet; at Weill's field, 85 feet; on the northwestern turnpike, about 40 feet; and on the back bone about 20 feet."

This is the territory, which we have shown is covered by the Virginia patents occupied by Virginia citizens and held up to the old line by them. Col. McDonald and Mr. Lee, after this line was run, differed as the effect of the acts of the Legislature under which they were appointed, and as to their duties as Commissioners; Mr. Lee insisting that the State of Virginia, by her act of 1852, acknowledged and adopted the meridian line from the Fairfax Stone to the Southern line of Pennsylvania as the boundary between Virginia and Maryland. (Record, page 414, also 441; letter of November 15th, 1859) whilst Col. McDonald denied this and stated that it was not his opinion that the State of Virginia, by said act or by any other act, had ever acknowledged and adopted said meridian line as the boundary line between the States, and that it was not in his opinion that the State of Virginia, by said act of 1858, directed the meridian line from Fairfax Stone to be established as the boundary between Virginia and Maryland. (Record, page 417, and also 432; letter of November 18th, 1859). The only action taken by the State of Virginia, after this, was apparently to appoint Col. McDonald to go to England for the purpose of procuring documentary evidence to establish the true lines of boundary between Virginia and the States of North Carolina, Tennessee and Maryland. (See letter of Mr. Lee to Governor Hicks, of June 30th, 1860, page 440.) The State of Maryland, on the other hand, by an act of her Legislature, passed March 5th, 1860, (Record, page 1362) attenmpted to establish the line run by Lieutenant Michler as the Northwestern line of that State. The language of the act is as follows:

"Maryland Laws, Acts of 1860, Chapter 385, Passed Mar. 5, 1860.

An Act for the establishment of the southeastern and northwestern boundary lines between this State, and the State of Virginia, and making further appropriation to complete the survey and marking of the same.

Section 1. Be it enacted by the General Assembly of Maryland, That the line established by the agreement of the commissioners authorized in the year sixteen hundred and sixty-eight, to fix the bounds of Virginia and Maryland, is hereby declared to be the true line of boundary between the two States on the Eastern Shore of Chesapeake bay, is a straight line from Smith's point, at the mouth of the Potomac, to the southernmost angle of the body of land defined by the aforesaid commissioner as Watkins' point.

Sec. 2. And be it further enacted, That the northwestern line of this state, is a line commencing at the Fairfax stone, at the head of the north branch of the Potomac river, and running thence due north to the southern line of the State of Pennsylvania, as surveyed in the year, eighteen hundred and fifty-nine, by the commissioners appointed by the State of Maryland and Virginia in conformity with the laws passed by the said States for that purpose.

Sec. 3. And be it further enacted, That the sum of ten thousand dollars or so much thereof as may be necessary, be and the same is hereby appropriated for the payment of this State's proportion of such expenses as may be required to complete the survey and record of said lines, and that the compensation of the commissioners on the part of this State, and that of the officer of the United States engineer employed under him, for services already rendered and to be rendered, shall be such reasonable compensation, as the Governor may in his discretion allow; Provided, the same does not exceed a yearly salary of two thousand dollars to the former and of one thousand dollars to the latter, and the Comptroller is hereby directed to issue his warrant or warrants upon the Treasurer in pursuance of the Governor's order therefor, for the payment of such sums of money as may be hereby required.

Sec. 4. And be it enacted, That this act shall take effect from the date of its passage."

And in accordance with this act, Mr. Lee was continued as Commissioner and completed certain surveying, which had not

been done by Lieutenant Michler, and marked the line with further monuments. (See his reports to Governor Hicks, found on pages 440 to 442 of the Record; also pages 58 and 59.)

West Virginia Adopted Michler Line Conditionally.

West Virginia, by an act passed in 1887, confirmed the Michler line conditionally. The condition was that the act was not to take effect until Maryland should have passed an act or acts confirming all Virginia patents to "lands situate—between the new Maryland line hereby established and the old Maryland line heretofore claimed by Virginia and West Virginia to the same extent and like legal effect as though the said old Maryland line were hereby confirmed and established." (Record, page 647.) Maryland, instead of complying with this condition, very soon brought this suit for the settlement of the boundary. It will thus be seen that the State of West Virginia was willing to adopt the Michler line, provided that the titles of her citizens to the territory between that line and the old line should be recognized and confirmed by the State of Maryland. These titles, as we have seen, really did not conflict with any ancient titles held by citizens of Maryland. There was no title granted by the State of Maryland for these lands, except such as had been granted after the Michler line was run, and under which no possession had ever been taken or expenditures made by the citizens of Maryland, and it would have been strictly just and equitable that this condition imposed by the Legislature of West Virginia should have been acceded to by the State of Maryland. The State of West Virginia was bound to protect her people, and could have done nothing less than she did do—insist upon their titles being preserved. It seems to us clear that the States of Virginia and West Virginia were justified in not accepting the Michler line as the boundary line between the States, because the Commissioners had not been authorized to run a new line, only to ascertain, trace and establish the old line already existing, and when Virginia found that this had not been done, she was unwilling to ratify the new line, but the State of West Virginia finally agreed to it on condition that the title of her citizens to the lands would be preserved. Thus the status was left with West Virginia still holding to the old line, insisting

upon the rights of her citizens, and never having abandoned that postion for more than a century.

Summary.

By the foregoing discussion we have endeavored to establish the following propositions:

First: That the boundaries of the State of Maryland are to be ascertained from the language of the charter granted to Lord Baltimore, as applied to the conditions then existing and to the topography of the country afterwards ascertained, and by the interpretation given to it by the king in council, and subsequent acts of both parties.

Second: That the charter calls for running from the Delaware Bay in a right line in the fortieth degree of North latitude from the equator to the true meridian of the first source or fountain of the Potomac River, thence "tending downward toward the South to the farther bank of said river and following it to where it faces the Western and Southern coast as far as to a certain place called Sinquak, situate near the mouth of the same River, where it discharges itself in the forenamed Bay of Chessopeak."

Third: That as an original proposition, judging from the course of the river, the topography of the country and the size of the branches, the North branch is the main Potomac River, and at the head of that branch is to be found the first source or fountain of the Potomac.

Fourth: That judging from the topography, the size of the branches and all the circumstances, the spring heads at which the Fairfax Stone was planted, are the first source and fountain of the river, and that if the first source or fountain were to be located and established according to present conditions, these springs could be selected with more reason than any other point.

Fifth: That the question as to the first source or fountain of the Potomac River was fully investigated and judicially determined by the only competent tribunal authorized to determine it, as early as 1746, in the controversy between Lord Fairfax and the Colony of Virginia, and the Fairfax Stone was planted in accordance with that determination, at the first fountain or source of the Potomac.

Sixth: That Lord Baltimore had notice of and was bound by

and fully acquiesced in that decision, and the matter, therefore, is *res adjudicata* as to him and the State of Maryland.

Seventh: That the Colony of Virginia asserted and held jurisdiction of all the territory South and West of the head spring of the North branch of the Potomac at the Fairfax Stone from the date of the decision in 1746 until after the Revolution, and that the States of Virginia and West Virginia have held said territory and exercised governmental jurisdiction over it continuously and exclusively to the present time.

Eighth: That Lord Baltimore declined to take any steps to reopen the question after the decision in 1746, and that after the Revolution, although the State of Maryland has from time to time asserted a claim to go to the head spring of the South branch of the Potomac, up to 1852, yet in that year and after that time she abandoned this claim, and has acquiesced in the claim of Virginia and West Virginia that the Fairfax Stone is at the first source or fountain of the Potomac, and that her Western boundary line should begin at that point. This much has been definitely settled since 1852.

Ninth: That the belated attempt in this suit to fix the head spring of the North branch at a point West of the Fairfax Stone is a creation of Mr. W. McCulloh Brown, the surveyor appointed in this cause, and is not maintainable upon any principle of law or equity; that whilst the spring head at which Mr. Brown located the point for running the Brown-Potomac meridian is farther West than the spring head where the Fairfax Stone is located and is on somewhat higher ground, yet the branch of the stream running from that spring is not as long nor as large—certainly no larger, than the one running from the Fairfax Stone, and that at the point where these prongs branch off, the stream running to the Fairfax Stone is the straighter stream and has all the appearance of being the main river.

Tenth: That no claim has ever heretofore been made that this Brown-Potomac spring is the first fountain of the Potomac. No line has ever been run from it, and the territory one and a quarter miles wide and thirty-six miles in length, lying between the meridian run from this spring and that run from the Fairfax Stone is completely covered by Virginia patents settled by Virginia citizens, occupied by hundreds of farms and some villages, all of whom have, from the earliest times, adhered to the States of Virginia and West Virginia, and that Maryland has

never exercised or attempted to exercise any governmental jurisdiction of any kind over it.

Eleventh: That prior to 1789, whilst at first there was some confusion in the issuing of patents for lands in that locality by the States of Virginia and Maryland, Virginia, in some instances, granting lands East of the due North line run from the Fairfax Stone, and Maryland granting some lands West of that line, yet, even before that date, a line had been run North from the Fairfax Stone and quite a number of Virginia patents had been granted as bordering upon that line, showing the claim of Virginia to go to that line as her boundary. And that Maryland had also granted several patents calling for that line as the boundary line.

Twelfth: In 1789, under the authority of the State of Maryland to lay out *all of her Western lands* as bounty lands, Francis Deakins ran what he intended, and evidently believed, to be a due North line from the Fairfax Stone, and laid out the Military lots up to and East of it, so far as the lands had not previously been granted by the State of Maryland; that this line, so established was recognized and acquiesced in by both States from that time in 1789 until 1859, Maryland never having made a survey for any land West of the Deakins line between 1789 and 1859, but having made several grants that called for that line and Virginia having covered all the territory up to that line by her grants; having worked the roads, collected the taxes, assessed the lands, provided free schools for the children and in every other way, known to law, exercised governmental jurisdiction over the territory.

Thirteenth: That all of the territory West of this old line, which had been embraced within the old Maryland grants, based on surveys made prior to 1789, was afterwards taken up and covered by Virginia patents and has been so held under said patents ever since, with the single exception of about one-half of the Elder Spring tract of 411 acres,—one-half of which is now assessed and held as being in West Virginia and the other half assessed and taxes paid upon it in Maryland; two persons living upon it claiming Maryland as their residence and voting in Garrett County, but it is covered by a Virginia patent; that with the exception of these two persons and of Ethbell Falkenstein, who has recently attempted to change his allegiance to the State of Maryland, all the other citizens and residents of this territory, up to this old line, have always held their allegiance to and rec-

ognized the government of Virginia and West Virginia. That between 1789 and 1859 Maryland in various ways by patents, etc., recognized the Deakins line.

Fourteenth: That for some reason, not fully explained, this old boundary line is not a continuous straight line, but is broken by offsets therein, but that it is well defined on the ground and recognized by the inhabitants, and many points in it have been located and established both by Mr. Brown, the surveyor on behalf of Maryland, and Mr. Monroe, surveyor on behalf of West Virginia, and by the evidence in the cause, so that there is no difficulty in locating and establishing it as it has always been held and claimed, and is still held and claimed by the citizens on both sides.

Fifteenth: That this old line does not run in a due North course from the Fairfax Stone, but verges to the right of the true meridian, and by reason of this divergance and of the offsets above mentioned, it reaches the Pennsylvania line about three-quarters of a mile East of the true meridian; that the Michler line, run under the direction of the Commissioners of Virginia and Maryland in 1859, by careful astronomical and scientific observations, is practically a due North line from the Fairfax Stone to the Pennsylvania line, although Dr. Bauer's report in this case attempts to show that there is some variations in it from the due North line; that the Commissioners, under whose direction the Michler line was run, were not authorized to establish a new boundary line, but only to trace out, locate and establish the old line already existing, and that because this was not done, a considerable part of the territory occupied by Virginia and held under her titles, was left out and thrown on the Maryland side; and because Maryland refused to recognize and protect these titles, Virginia and West Virginia did not ratify or adopt this Michler line, but continued to hold to the old line and have so held ever since.

We believe that all the propositions and facts contained in the above statement have been fully established by the evidence and are practically undisputed in this case.

What is the Law Governing the Parties Upon the Foregoing Facts.

The following propositions of law, which we think are ap-

plicable to this case, have been established by decisions of this Court, rendered in suits involving disputed boundaries between States of the Union:

First: That this Court has jurisdiction of a suit by one State against another to ascertain and establish a disputed boundary between such States.

R. I. v. Mass., 12 Pet., 657; Same case, 14 Pet. 225; 4 How. 590; Missouri vs. Iowa, 7 How. 679; Same case, 10 How. 49; Indiana vs. Kentucky, 136 U. S. 479; Nebraska vs. Iowa, 143 U. S. 359; Virginia vs. Tennessee, 148 U. S. 527; Virginia vs. West Virginia, 11 Wall. 39.

Second: That the location of a boundary line is a matter of fact, which this Court is capable of ascertaining in a suit in equity, and when such boundary is ascertained, it separates the one State from the other, for neither State can have any right beyond its territorial boundary, and that title, jurisdiction and sovereignty are dependent questions, necessarily settled when boundary is ascertained; the boundary being the line of territory, in the line of power over it.

R. I. v. Mass., 12 Pet. 733-734.

Third: The Court does not act differently in deciding on boundary between States than on lines between separate tracts of land. If there is uncertainty where the line is, if there is a confusion of the boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud or time, or other kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded, or, if the Court are satisfied without either, they decree what and where the boundary of a farm, a manor, a province or a state is and shall be.

R I. v. Mass., 12 Pet., 658-734-738.

R. I v. Mass., 4 How., 628.

Fourth: When no other matter affects a boundary, a decree settles it as having been by original right at the place decreed. in the same manner as where it is settled by treaty or compact, and all dependent rights are settled when boundary is.

R. I. v. Mass., 12 Pet., 734.

1 Ves. Sen., 448-450.

Fifth: A boundary established and fixed by compact between

nations becomes conclusive upon all the subjects and citizens thereof and binds their rights and is to be treated, to all intents and purposes, as the true real boundary. The construction of such a compact is a judicial question, and this doctrine applies to the settlement of the boundary between two States of the Union by compact between such States

R. I. v. Mass., 12 Pet., 657.
Va. v. Tenn., 148 U. S., 503.
Va. v. W. Va., 11 Wall., 39.

Sixth: That in the absence of a compact or agreement, establishing a boundary, this Court in case of a disputed boundary between the States, will so mold the rules of the chancery pleading and practice as to bring the case to a final hearing on its merits, and that this Court regards such cases as too important in character and involving interests too great to be decided upon mere technical principles of chancery pleading, but will decide the case upon principles of an elevated and perfect justice, unfettered by technical subtleties and petty forms, but will apply those same fundamental doctrines of international law, which, by the common consent of mankind are the basis of the intercourse of the civilized world.

R. I. v. Mass., 14 Pet., 210-225.

Seventh: That possession, or as it is called in books on international law, *usu caption*, for a long period of time is the best evidence of a national right.

Vattel, 187-191 &c.

Eighth: Possession for a great many (more than one hundred) years becomes a rightful one by prescription, even if it had begun in wrong and injustice. The acquiescence of the adjoining State for such a lapse of time would be *conclusive* evidence that she assented to the possession thus held and had determined to relinquish her claim.

Opinion of Ch. J. Taney, R. I., v. Mass., 14 Pet., 260-261.
R. I. v. Mass., 4 How., 590-591.
Louisiana vs. Mississippi, 202 U. S. 1.

Ninth: It is a principle of public law, universally recognized, that long acquiesence in the possession of territory and in the

exercise of dominion and sovereignty over it, *is conclusive of the nation's title and rightful authority.*

Ind. v. Ky., 136 U. S. 479.

Tenth: Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located, marked upon the earth and afterwards recognized and acquiesced in by the parties for a long course of years, is *conclusive*, even if it be ascertained that it varies somewhat from the courses given in the original grant, and the line so established, takes effect not as an alienation of territory, but as a definition of the true and ancient boundary.

Va. v. Tenn., Opinion of Mr. Justice Field, p. 522, citing Penn v. Ld. Baltimore, 1 Ves. Sen., 444-448;
Boyd v. Graves, 17 U. S., 4 Wheat., 513.
R. I. v. Mass., 12 Pet., 657.
U. S. v. Stone, 2 Wall., 525-537.
Kellogg v. Smith, 7 Cush., 375-382.
Chenery v. Waltham, 8 Cush., 327.
Hunt, Boundaries, (3d. ed.), 306.
Ind. v. Ky., 136 U. S., 479-516.
R. I. v. Mass., 4 How., 591-639;

In which latter case the following language is used:

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Also quoting Vattel, Law of Nations, book 2, ch. 11, sec., 149 as follows:

> "The tranquility of the people, the safety of states, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to ad-

> mit prescription founded on length of time as a valid and incontestible title."

Also quoting Wheaton on International Law, part 2, ch. 4, sec. 164, as follows:

> "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question."

Mr. Justice Field then uses the following language on page 524:

> "There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home, and to family, on which is based all that is dearest and most valuable in life."
>
> Va. v. Tenn., 148 U. S., 524.

In this case of Va. v. Tenn., it is held that an agreement, for the appointment of commissioners to run and mark the boundary line between the states, did not require the approval of congress, under the Constitution; that such approval was not necessary until the states had passed upon the report of the commissioners, ratified their action and mutually declared the boundary established by them to be the true and real boundary between the states, and that the consent of congress to this final compact may be either express or implied. And the assent of congress is implied from the fact that in the laying out of federal, judicial and revenue districts, and in the holding of federal elections the line so agreed upon has been adopted and conformed to by congress and the federal government. There are held to be sufficient facts from which the consent of congress may be implied.

The Law Applied.

It is clear from these authorities that this Court, in a case of disputed boundary between two states of the Union, has jurisdiction and power *not to make a boundary, not to create a new line*, but only to ascertain from the evidence before it, what is the real and true boundary between such states, and, when ascertained, to establish it by a final decree. If there has been a compact or agreement between the states, settling and fixing the boundary between them, this Court will recognize and uphold such compact and establish the boundary according to its construction of the language of the compact.

Va. v. Tenn., 148 U. S., 503.

Poole v. Fleeger, 11 Pet., 185, quoting Story, Justice, page 209.

If there has been no compact settling the boundary, then the Court will ascertain and settle it under the rules of law and equity from the evidence before it. It may be settled by the determination of a doubtful question in the construction of a charter or grant of territory. It may be settled by the determination of a disputed question as to the proper location of a line or corner on the ground, or the identification of natural objects. It may be settled by applying the doctrine of prescription, long continued possession and exercise of authority by one state over the disputed territory, either with or without the acquiescence of the other party. The acquiescence and assent of the other party will be conclusively presumed after a great lapse of time, even if such other party, by its declarations, from time to time, indicated that it did not concur in or consent to such occupation and jurisdiction.

R. I. v. Mass., 4 How., 590-591.

In this case the State of Rhode Island made persistent and continual claim by acts and resolutions of her legislatures, appointment of commissioners and in other ways.

See page 635.

Va. v. Tenn., 148 U. S., 527.

When the Court has ascertained the boundary line between the states, according to any of the methods above mentioned, or in any other way, such line, so ascertained, will be established and fixed as the true boundary between the states.

Was There a Compact?

It will not be disputed, we think, that the existence of a compact or agreement between the States may be established by any evidence that satisfies the mind of the Court. A compact may be proven by the doctrine of estoppel. Maryland, Virginia and West Virginia are all states of this Union, bound together by the constitution of the United States. This constitution, in a certain sense, is a compact between the states, by which each state recognizes the independence, sovereignty, territory and jurisdiction of all the other states of the Union, and each surrenders certain rights to the general government for the general good. When West Virginia was created out of the territory of Virginia it required the consent of congress. Representatives of the State of Maryland sat in the congress, which consented to the creation of the new State, and acted upon the question of the admission of the New State into the Union. Whether they voted for it or against it we do not know, but it is immaterial. They and the State they represented were bound by the result. The territorial limits of the State of West Virginia are fixed and set forth in the act by which she was admitted into the Union. The language is as follows:

> "Whereas the legislature of Virginia, by an act passed on the thirteenth day of May, eighteen hundred and sixty-two, did give its consent to the formation of a new State within the jurisdiction of the said State of Virginia, to be known by the name of West Virginia, and to embrace the following named counties, towit: Hancock, Brooke, Ohio, Marshall, Wetzell, Marion, Monongalia, *Preston*, Taylor, Tyler, Pleasants, Ritchie, Doddridge, Harrison, Wood, Jackson, Wirt, Roane, Calhoun, Gilmer, Barbour, *Tucker*, Lewis, Braxton, Upshur, *Randolph*, Mason, Putnam, Kanawha, Clay, Nicholas, Cabell, Wayne, Boone, Logan, Wyoming, Mercer, McDowell, Webster, Pocahontas, Fayette, Raleigh, Greenbrier, Monroe, *Pendleton*, *Hardy*, *Hampshire* and Morgan; and whereas both the convention and the legislature aforesaid have requested that the new State should be admitted into the Union, and the constitution aforesaid being republican in form, Congress doth hereby consent that the said forty-eight counties may be formed into a separate and independent State; Therefore."
>
> (Record, page 1379.)

In the counties thus enumerated we find Preston, Pendleton, Randolph, Tucker, Hardy and Hampshire. The counties of Grant and Mineral were not then in existence. They were afterwards created out of the Western parts of Hardy and Hampshire. As we have shown, the counties of Hardy, Hampshire and Pendleton embrace the territory between the North and South branches of the Potomac. The county of Tucker runs to the Fairfax Stone, and the county of Preston adjoins Garrett County, Maryland, and runs to the Fairfax Stone and then North to the Pennsylvania line. We think, therefore, that Maryland is estopped to deny that the territory originally embraced in Hampshire, Hardy, Pendleton, Randolph, Tucker and Preston Counties is part of the State of West Virginia. There is no question as to what were the boundary lines of Hampshire, Hardy, Randolph and Tucker. If there is any question as to the boundary line of Preston County, such question applies only to the strip of land between the Michler line and the old Deakins line, because Tucker and Preston both call to run to the Fairfax Stone, and the line of Preston runs North from the Fairfax Stone to the Pennsylvania line.

We submit that Maryland is bound by this action to recognize whatever were the boundaries over which Preston County exercised governmental jurisdiction at the time of the admission of West Virginia into the Union, in 1862; but, be this as it may, she cannot deny that the territory embraced in these counties above named is a part of the State of West Virginia, and, as above stated, there can be no controversy as to the territory embraced in any of the counties, unless it be that along the Eastern boundary of Preston County. As to all the other territory, except that, therefore, between the Michler and Deakins lines, we submit that the evidence is sufficient to justify the Court in holding that Maryland has recognized it as belonging to the State of West Virginia by the act of admitting her into the Union, which is in the nature of a compact between the States.

Acquiescence.

But as said by Mr. Justice Field, in the case of Virginia v. Tennessee, 148 U. S., 522, independently of any such compact, a boundary line between states, which has been run out, located

and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant. Without again discussing the acquiescence of Maryland in the North branch as the boundary, and the Fairfax Stone as a corner in that boundary, we submit that the above quoted language applies with peculiar force to the old Maryland or Deakins line as a boundary line between the states. There is no question but that a line was run and marked on the ground by Francis Deaki[illegible]n 1789, and one had been run and recognized by both states before 1789. We have shown that from 1789 certainly until 1859 that line was recognized and acquiesced in both by the States of Virginia and Maryland, as the true boundary line between the States. We have shown that, although prior to 1774, Maryland had made some surveys extending beyond that line, yet she never afterwards attempted to make any further surveys of territory West of the Deakins line; that between 1789 and 1859, Maryland made the following surveys and grants, calling for this Deakins line: Siege of Acre, 1839; Troas, in ———; Buckdale, survey 1848, Eelshine, 1849; Ninesburg, in ———; Maryland, 1823, survey 1810; Whipperwill, 1842, survey 1835; Hammonds Corner 1842, survey 1839; West Point, in 1793; and Scales in ———, and probably others not now recalled. The evidence shows clearly that all of these surveys made by the State of Maryland, adjoin and call for the old line, and none of them extend as far West as the Michler line. The laying out of the Military lots in 1789 along this old line, whilst accompanied by the protest that it was far within her boundaries, yet was recognition that she did not care to controvert the question with the State of Virginia, and so from 1774 until after 1860, Maryland acquiesced in this line that had been located and marked on the ground. Virginia claimed to it and her people took possession and held up to it. Maryland had no possession West of it. Now if this line can be retraced, ascertained and located on the ground, in the light of the decisions of this Court, it will be held to be and will be established as the real true boundary line between the States, even if it varies from the courses given in the original grant.

We have shown that there is no real difficulty in ascertaining

and locating this line upon the ground. Mr. Brown, the surveyor for Maryland, has located and reported to the Court eight points in this old line as pointed out to him by witnesses, owners of lands and residents in the neighborhood and located by him on the ground. These points are designated on his map by the letters "WC", "WD", "WF", "WG", "WI", "WK", "WL", "WM", and "WZ", extending from ———— miles North of the Fairfax Stone at intervals all the way to the Pennsylvania line. In addition to the points established by Mr. Brown, which are also located and established by Mr. Monroe, the latter has located on the ground *fifty-one points* in this old line, as recognized and held to by the citizens along it, extending from the point where the line crosses the Potomac, North of the Fairfax Stone, to the Pennsylvania line; these points being so located that there is no difficulty whatever in running a line through them and establishing it according to the present holdings of the citizens along there. What is there then in the way of establishing this as the true boundary line under these decisions? If the Court should be of opinion that according to the original charter the line running from the head spring of the Potomac to the Pennsylvania line should be a due North line, then it would be true that this old Deakins line varies from the courses in the original grant. We submit that there is nothing in the original charter which requires this line to be run as a due North line, but if there is, still that cannot prevent the Court from recognizing and establishing this old line as the true line at this time, because this old line was run and located and marked on the ground and has been acquiesced in and recognized for three-quarters of a century by both States. This line not only varies from a due North course, but it is not a straight line. It has offsets in it, caused, perhaps, by imperfect surveying on account of the roughness of the country at the time, or more probably by a different location of the old Maryland grants, which are called for by Deakins in locating these Military lots, from the location that he attributed to these old grants. But, from whatever cause it has arisen, these offsets exist in the line; but this is exactly the condition that existed in the case of Missouri v. Iowa, 10 How., 2. In that case a line had been run and marked in 1816 by John C. Sullivan. There was a line prolonged due West from Sullivan's Northwest corner on a parallel

of latitude to the middle of Missouri River, and the Court decreed that this was the true Northern Boundary of the State of Missouri, and decreed (in the case of Mo. v. Iowa, 7 How.,) page 679 as follows:

> "That the true and proper northern boundary-line of the State of Missouri, and the true southern boundary of the State of Iowa, is the line run and marked in 1816, by John C. Sullivan, as the Indian boundary, from the northwest corner made by said Sullivan, extending eastwardly, as he run and marked the said line, to the middle of the Des Moines River; and that a line due west from said northwest corner to the middle of the Missouri River is the proper dividing-line between said States west of the aforesaid corner; and that the States of Missouri and Iowa are bound to conform their jurisdictions up to said line on their respective sides thereof, from the River Des Moines to the River Missouri."

And the Court appointed Commissioners to find and re-mark the line run by said Sullivan in 1816, extending eastwardly from said northwest corner to the Des Moines River; and especially to find and establish said northwest corner, and to mark the same as hereinafter directed; and also to run a line due west, on a parallel of latitude, from said corner, when found, to the Missouri River, and to mark the same. The commissioners made their report to the Court, which is found in the case of Missouri v. Iowa, 10 How., page 1. They reported great difficulty in finding Sullivan's Northwest corner. On page 49, the Court, in its decree, uses the following language:

> "And it further appears from the report of said commissioners, that, pursuant to our former decree, they had ascertained and re-marked Sullivan's line, as run and marked by him in 1816, extending eastwardly from the old 'northwest corner,' above described and established. Sullivan's line, as run and marked in 1816; from said corner east, to the Des Moines River, was found not to be a due east line; but that more or less northing should have been made in the old line. Nor is it a straight line, as sudden deviations amounting to from one to three degrees frequently occur; and it rarely happens that any two consecutive miles pursue the same direction. It also appears, that, if the whole

> line was reduced throughout to a straight line, its southing would be about two degrees from a due east line."

Yet the Court confirmed said report, although the line was found not to be a due East line and had a great many deviations and offsets in it; but the commissioners found the marked trees on the ground, showing where this line had been located, just as the surveyors in this case found upon the ground trees, stones, fences and various other objects pointed out by the citizens, showing where the old line is, so that this Court, by these two cases of Missouri v. Iowa, and Virginia v. Tennessee, has established the principle that where a line has been once run and has afterwards been acquiesced in for a long number of years by two states, the Court will establish it, although it varies from the original course in the charter, and although it may not be a straight or uniform line. In other words, all that the Court requires is to be satisfied as to the location of the old line. Then it establishes it as final. This is not only the rule between states, but it has always been the rule between individuals when establishing a boundary line. The old surveys of Virginia, with which we are familiar, rarely ever conform strictly with the original calls, when applied to the ground itself, but if the natural objects called for, can be found, or if there is any evidence by which the Court and jury can be satisfied as to the routes taken by the surveyor when he originally laid out the ground, that line will be adopted, and the course and distance will be disregarded. This doctrine is so familiar that it is almost unnecessary to cite authorities; but the authorities are abundant, not only in the State courts, but in the decisions of this Court.

> Bartlett &c Co. v. Saunders, 103 U. S., 316; see opinion of Mr. Justice Bradley, p————.
> McIvers, lessee, v. Walker, 9 Branch., 173.
> Same case, 4 Wheat., 444.
> Newsome v. Pryor, 7 Wheat., 7.
> Cavazos v. Trevino, 6 Wall., 773; see page ———.

This Court has held that "owners of adjacent tracts of land are not bound by consent to a boundary which has been defined under a mistaken apprehension that it is the true line, wherever it may be found; and in such case either the party is precluded or

estopped from claiming his own rights under the true one when discovered."

Schraeder Mining & Manufacturing Co. v. Packer, 129 U. S., 688.

Hatfield v. Workman, 35 W. Va., 578.

But it is also held in the same cases that where a boundary line has been fixed as a settlement of a disputed boundary and possession taken and held in accordance with such settlement, the parties are bound by it, although the agreement of settlement is merely oral. Such parol agreement is not regarded as passing any land from one proprietor to the other, but as simply ascertaining the line to which their respective deeds extend.

Schraeder Mining & Manufacturing Co. v. Packer, 129 U. S.

Gwynn v. Schwartz, 32 W. Va., 487-488-500.

Le Compte v. Freshwater, 56 W. Va., 336.

In the latter case the syllabus is as follows:

> "To make valid an oral agreement, to fix a line between two contiguous tracts of land, there must be doubt and uncertainty as to the true place of the line, else the agreement is void. Where there is in fact, under the facts, such doubt and uncertainty, such oral agreement, if at once carried into execution by actual possession, is valid without other consideration than the settlement of disputed boundary.
>
> Le Comte v. Freshwater, 56 W. Va., 336.

It is also held that long acquiescence by one adjoining proprietor in a boundary, as established by the other, is evidence of an agreement that such is the boundary. Thus, in the case of Snead v. Osborne, 25 Cal., 626, Judge Rhodes, delivering the opinion of the Court, said:

> "The authorities are abundant to the point that when the owners of adjoining lands have acquiesced for a considerable time in the location of a division line between their lands, although it may not be the true line acording to the calls of their deeds, they are thereafter precluded from saying it is not the true line. The better opinion is that the considerable time mentioned in the cases must, at least, equal the length of time prescribed by the statute of limitations to bar a right of entry."
>
> Schraeder v. Packer, 129 U. S., 688.

Hatfield v. Workman, 35 W. Va., 578.
Gwynn v. Schwartz, 32 W. Va., 487-500.
Le Comte v. Freshwater, 56 W. Va., 336.
Kip v. Norton, 12 Wend., 127.
Jackson v. Ogden, 7 Johns., 338.
Jackson v. Freer, 17 Johns., 29.
McCormick v. Barnam, 10 Wend., 104.
Dibble v. Rogers, 13 Wend., 536.
Adams v. Rockwell, 16 Wend., 285.
VanWick v. Wright, 18 Wend., 157.
Boyd's lessee v. Graves, 4 Wheat., 513.
Kellogg v. Smith, 7 Cush., 375.
Jackson v. Bowen, 1 Caines, 358-362.
Jackson v. Dysling, 2 Caines, 198-200.

It will be seen from these and numerous other authorities that it is not only in cases where there has been an express oral agreement fixing the disputed boundary line, accompanied by possession, that the parties are held to be bound by it, but where the line has been fixed by one of the parties and possession held by that party for a considerable time up to the line so fixed, the other party will conclusievly be presumed to have agreed to and accepted that as the true boundary line. Now it is true that in this case the Deakins line was run under the authority of the State of Maryland, and, whilst Deakins was not expressly authorized to run the boundary line between Maryland and Virginia, yet he was directed to lay out in lots all the unappropriated land belonging to the State of Maryland West of Fort Cumberland, and he adopted the line running North from the Fairfax Stone as the limits of those lands and therefore the limits of the boundary of the State of Maryland; and it is also true that, in confirming his report, the Legislature of Maryland stated that this line was believed to be well within her boundaries; yet the State of Virginia accepted this line, moved up to it, made her grants conform to it and ever afterward held possession along it and exercised jurisdiction up to it, and Maryland never, for three-quarters of a century, disturbed her in that possession. This is a stronger case than those cited, because in this case the line was run by Maryland and adopted and accepted by Virginia and possession held to it, undisturbed by Maryland for this long period of time. The practical interpretation which the parties

by their conduct have given to a written instrument or to an agreement or survey is entitled to weight.

Cavazos v. Trevino. 6 Wall., 773.

Jurisdiction Complete and Exclusive.

The only question that remains to be discussed, it seems to us, is that which arises from the fact that the Eastern portion of the tract called "Elder Spring," which lies between the Michler line and the old Deakins line, is claimed to be held by two of the present owners under the old Maryland grant, although the grant of territory is covered by the Virginia grant to Deakins of 8000 acres. For some reason two of these people had their lands assessed and paid taxes and have voted in Garrett County, Maryland, whilst all the territory surrounding this tract, both East and West, North and South, is held under Virginia patents by people who claim to reside, vote and pay taxes on the land in West Virginia. We submit that this action of these isolated individuals cannot have the effect to prevent the State of West Virginia from getting the benefit of the doctrine of long continued, possession and exercise of jurisdiction and governmental authority.

A somewhat similar situation existed in the case of Va. v. Tenn., 148 U. S. We find on page 527, that it appeared that the old line "has been recognized by all the residents near it, except those in the triangle at Denton's Valley and in another district of small dimensions, in which it is stated that the people have voted as citizens of Virginia and have recognized themselves as citizens of that state." The Court, however, in its opinion held that this would not prevent the application of the doctrine in that case. The language of the Court is as follows:

> "That fact, however cannot affect the potency and conclusiveness of the compact between the states by which the line was established in 1803. The small number of citizens whose expectations will be disappointed by being included in Tennessee are secured in all their rights of property by provisions of the compact passed especially for the protection of their claims."

It is true that in this case the Court disregarded this matter on the ground that the matter was fixed by compact, but it seems clear to us that no matter how the line is fixed, whether by compact or by acquiescence and recognition between the states, if

the Court finds that it is fixed and established, the fact that two citizens, out of several hundred along the line, have claimed to be in the other state, contrary to the line so fixed and acquiesced in, cannot prevent the Court from recognizing and establishing the line by its decree. In this case, as in the Virginia-Tennessee case, the rights of these citizens cannot be affected by the decree establishing this old line. There is no Virginia grant covering their territory, which is claimed adversely to them. They have held this territory for years and are in possession of it, and under the decisions of Virginia and West Virginia, although their patents and deeds may have been void originally, yet they furnish color of title, and we believe they will be protected fully as against any claim either under the old Deakins patent of 8000 acres, or under any new grant that might be made. In a great controversy like this, where thousands of acres of land are involved and the rights of hundreds of people, the adverse attitude of two people claiming about 200 acres of land cannot prevent the application of legal and equitable principles usual in such cases for the settlement of a controversy. De minimus lex non curat.

Great Injury and Loss Would Be Inflicted Upon the Inhabitants Living Between the Deakins and the Michler Line if the Michler Line Shall Be Established.

It has been shown in the evidence that there are a large number of people living between the old Deakins line and the Michler line, all of whom, with two or possibly three exceptions, claim titles under grants issued by the state of Virginia. A portion of this territory is covered by the old Maryland grants based upon surveys made prior to 1789. As to another large part of the territory there were no Maryland grants until after the running of the Michler line in 1859. After that line was run and adopted by the State of Maryland in 1860, certain persons took out new Maryland patents, or re-surveys upon old patents, so as to cover this new territory between the two lines. Now in case of an adverse decision to West Virginia in this case, establishing the Michler line, doubtless attempts will be made to re-assert title under the old grants and especially under these new grants made since 1859. And, as we understand the holdings of this Court, the patents issued by Virginia for this territory East of

the Michler line will be held to be void as against the patents issued for the same territory by the State of Maryland.

Judge Baldwin, in delivering the opinion of this Court in the case of Rhode Island v. Massachusetts, 12 Pet.. 657. at page 748, used the following language:

> "It is said that the people inhabiting the disputed territory aught to be made parties as their rights are affected. It might for the same reason be objected that a treaty or compact settling boundary required the assent of the people to make it valid, and that a decree under the ninth article of confederation was void, as the authority to make it was derived from the legislative power only. The same objection was overruled in Penn v. Baltimore; and in Poole v. Fleeger, this court declared that an agreement between states, consented to by congress, bound the citizens of each state. There are two principles of law of nations which would protect them in their property. 1st: That grants by a government *de facto* of parts of a disputed territory in its possession are valid against the state which had the right. 12 Wheat. 600-601; 2d: That when a territory is acquired by treaty, cession, or even conquest, the right of inhabitants to property are respected and sacred. 8 Wheat., 589, etc."

It was believed from this statement of the law by Mr. Justice Baldwin that the title of private citizens, holding the land under grants of the sovereignty in possession would be protected in case it should afterwards be determined that the territory belonged to another sovereignty. But this question came directly before the court subsequently in the case of Coffee v. Groover, 123 U. S., 1. decided in 1887. In that case it was held that the language of Judge Baldwin, so far as it applied to a case where a *disputed boundary* between two states is adjusted and settled, was a mere dictum and not a correct statement of the law. In Coffee v. Groover the following propositions are decided:

> "Grants of land made by a government, in territory over which it exercises political jurisdiction *de facto*, but which does not rightfully belong to it, are invalid as against the government to which the territory rightfully belongs.
>
> Where a disputed boundary between two states is adjusted and settled, grants previously made by ei-

ther state, of lands claimed by it, and over which it exercised political jurisdiction, but which, on the adjustment of the boundary, are found to be within the territory of the other state, are void, unless confirmed by the latter state; and such confirmation cannot affect the titles of the same lands previously granted by the latter state itself.

The boundary between Georgia and Florida was long in dispute; Georgia claiming to a line called Watson's line, and exercising political jurisdiction, and making grants of land to that line; whilst Florida claimed to a line called McNeil's line, further north than Watson's. Upon running the true line, as finally agreed upon by the two states, it was found to be further north than McNeil's line; — Held, 1, That the grant made by Georgia of the land in dispute, which was south of McNeil's line, though made whilst Georgia exercised the powers of government *de facto* over the territory there, was nevertheless void. 2, That the confirmation by Florida of the grants made by Georgia, did not invalidate or disturb the grant of the land in dispute previously made by itself."

Under this decision in case the Michler line should be established as the true boundary line between the states, all the titles granted by Virginia East of that line will be void; that is to say, none of the several hundred inhabitants that live in that territory now, except two or three, will have any valid title to the lands which they occupy and which, in many instances, have been occupied by them and their predecessors in title for many, many years; whilst the holders and claimants under the Maryland patents, which have been taken out simply to cover these lands and under which no possession or exercise of right has been had, will have the rightful legal title to these lands and will be able to turn the inhabitants now living there out of house and home as the result of the decision of this question. This result would be so disastrous, would rend so many home ties, break up tender associations and violate so many of the most tender sentiments of the human heart and cause such great suffering and loss that we feel sure this Court will not render such a decision unless there is no escape from it under the principles of law and equity. As we have seen, this case is to be decided, not according to any statutory law, but only according to the principles of the very highest equity and justice, and it would seem that no decision can

be in accordance with these principles, which would lead to such disastrous results.

The North Bank of the Potomac is the Boundary Line, and Not the South Bank.

There remains to be discussed the question as to which State the Potomac River belongs, whether it is embraced within the boundaries of Maryland or whether her boundaries only go to the North bank of the Potomac River. This question arises upon the cross-bill filed in this cause by the State of West Virginia, and the answer of the State of Maryland thereto. The State of West Virginia claims and insists that the boundary line between her and the State of Maryland is the line of low water mark on the North bank of the Potomac River, from the division line between Virginia and West Virginia to the head spring of the North branch of the Potomac, the Fairfax Stone, and thence running from said Fairfax Stone by the old Deakins line to the Pennsylvania line.

The facts and considerations, upon which this claim of West Virginia to the Potomac River is based, are so fully set forth in her cross-bill, found on pages 501 to 518 of the Record, that very little can be added in this brief, which will elucidate the matter further. We invite the Court's special attention to facts and considerations set forth in this cross-bill, and we submit that they are fully sustained by the evidence, which has been introduced. The contention of West Virginia in this cross-bill, briefly summarized, is as follows:

First, When the charter of Maryland was granted it is manifest that it was believed that the head spring of the Potomac River was North of the fortieth degree parallel, and that the meridian line drawn through the head spring would be West of a considerable part of the River, and that the fortieth degree parallel of latitude would have to cross the river to intersect the meridian. The charter therefore provided that the line from the point of intersection of the parallel and meridian should tend Southward to the farther bank of the river. In that case the farther bank of the river from said point of intersection would have been the Northern bank. No one at that time believed that there was a great bend in the river, Southward, as there is in the locality of Cumberland, Maryland, but it was supposed to continue in its

Northwestern course. This is shown by the instructions which were given to the surveyors of the king, who were to survey out Lord Fairfax's grant. They were charged to take observation and note where the Potomac River crossed the fortieth parallel of North latitude. (Record, page ———.) It is an established canon of construction that an instrument will be construed according to the facts and circumstances and the knowledge and information of the parties to it at the time, so as to get at their intention and understanding. If the Maryland charter is construed in this way in the light of the knowledge of the parties to it at the time, then the boundary line was to run on the North, and not on the South bank of the Potomac River to the Chesapeake Bay.

Second: The early and almost contemporary construction which was given to the Maryland charter by the king of England shows that it was understood by the king and his council that the Potomac River had not been granted to Lord Baltimore by charter granted by Charles I, King Charles II, in 1649, in his grant of the Northern neck of Virginia to the Earl of St. Albans and others, which was confirmed in 1663, granted the Potomac River and all the islands within its banks. The language of the grant is as follows:

> "All that entire tract, territory or parcel of land, situate, lying and being in America, and bounded by and within the head of the rivers Tappahannock or Rappahannock, and Quiriough or Pottowmack Rivers, the courses of the said rivers as they are commonly called or known by the inhabitants and description of those parts and Chesapeake bay together with the rivers themselves and all the islands within the banks of those rivers. And all woods, &c." (Record, page 512.)

These charters were granted upon recommendation of the council or the Lords Committee of Plantations. The controversy between the Virginia Colony and Lord Baltimore as to his charter, had arisen before this, and it would seem reasonable to suppose that the matter as to whether the Potomac River was within the charter limits of Lord Baltimore, was discussed, and that King Charles II acted upon full information and advisedly in granting the Potomac River to the Earl of St. Albans and others as a part of the Northern neck of Virginia. (See report and documents of the

Virginia Commissioners, 1873, filed as Exhibit A with the answer, pages 77 to 362 inclusive.)

Third: By the treaty of peace between Great Britain and France, concluded in the city of Paris February 10th, 1763, the boundaries of the several provinces of the respective sovereignties in America were fixed and determined. The English maps made under that treaty by Eman Bowen, Geographer to his Majesty, contains a number of the articles of the treaty printed on its face, and there is also on its face the following inscription:

> "The limits of his Majesty's several provinces are here laid down as they at present exercise their jurisdiction. But the limits of the Massachusetts province with New York, New York with New Jersey, Connecticut with New York and Pennsylvania with Maryland are not yet fully determined. Nor is the boundary of North Carolina and of South Carolina yet settled, or of South Carolina and Georgia." (Record, page 513.)

The boundary between Maryland and Virginia was settled and an inspection of this map will show that the boundary line between these provinces was distinctly laid down on the left, or the Northern bank of the Potomac River. This map is the next to the last map between pages 494 and 495 of the Record. This was done under the treaty making power of Great Britain. It shows that the crown of England regarded the Potomac River as belonging to Virginia. This information was given to France to guide her in her intercourse with the Colonies. There can be no question of the treaty making power of Great Britain to determine this question. It was strictly in accordance with the act of Charles II in granting the Northern neck, as we have seen.

Fourth: Mitchell's map, which was made with the approbation and at the request of the Lords Commissioners for Trade and Plantation, 1750, published in 1755, shows the boundary line to be on the North bank of the Potomac. This map is the last map between pages 494 and 495 of the Record. The Lords Commissioners for Trade and Plantations is that department of the English Government that had special charge and jurisdiction over all matters relating to the Colonies, and this map was made by Mitchell, as he states, from official documents, maps and charts in said office.

Fifth: As has been shown, the Virginia charters were cancelled under *quo warranto* proceedings, and the Colonies became crown Colonies, but her boundaries and jurisdiction were unaffect-

ed thereby and fully preserved. Upon the Revolution in 1649, the Colonies of Virginia remained loyal to the crown, and parliament in 1651 sent over Commisesioners to reduce all the plantations within the Chesapeake Bay to due obedience to parliament and the Commonwealth of England. The Virginia authorities surrendered to these Commissioners, and by the articles at the surrender, it was agreed that Virginia shall have and enjoy the ancient bounds and limits mentioned by the charters of the former kings, and that we shall seek a new charter from parliament for that purpose against any that have entrenched upon the rights thereof." (Record, page 1374.) The same Commissioners then proceeded to reduce the Colony of Maryland, and they established for her a provisional government, with Bennett for Governor, and Clayborne for Secretary. From 1652 to 1654 the government was entrusted to a board of ten. After the death of Oliver Cromwell, the Colonial authorities of Maryland asserted the supreme authority of the people, and that the allegiance of the Colony was due to the crown. (See exhibit A filed with the answer, pages ——— and ——— of this record.) Lord Baltimore was deprived of his proprietary rights for eleven years, or more, under the Commonwealth and Cromwell, and again by the king from 1690 to 1715. It was not until 1715 that he was restored to his proprietorship of Maryland. In the meatnime, in 1649, confirmed in 1663, the Northern neck of Virginia had been granted to Lord Hopton, in which the Potomac River was included, as we have seen. This was while the Maryland Colony belonged to the crown, and during the deposition of the Lord Proprietor, so that if the Potomac River had been originally included within the limits of his charter, it was taken away from him by the grant of the Northern neck to Lord Hopton and others, which was subsequently confirmed by Charles II upon his restoration to the throne of England. Lord Baltimore never regained the territory taken by Penn off the Northern boundary. He never regained the territory included within the province of Delaware, and there is nothing to indicate that he ever regained the Potomac River after its grant to Lord Hopton and after the settlement with the parliamentary Commissioners.

Sixth: The King of Great Britain and his council had absolute authority and control over the American Colonies before the American Revolution and could change their limits and jurisdiction at his royal pleasure. It was, therefore, entirely within the power of Charles II to grant the Potomac River to Lord Hopton, as he did,

although it may have been embraced within the limits of the charter previously granted to Lord Baltimore.

We have given this brief summary of the contention of the State of West Virginia on this point, but respectfully refer the Court to the cross-bill of the State of West Virginia in this cause, together with the exhibits filed therewith and referred to therein, for a full discussion of the question, and we respectfully submit that the claim of the State of West Virginia is fully made out to the jurisdiction over the Potomac River to low water mark on its Northern bank.

Respectfully submitted,

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Attorney General.

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Special Counsel for W. Va.

No. 1 Orig.

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND, Complainant,
v.
STATE OF WEST VIRGINIA, Defendant.

In Equity.

SUPPLEMENTAL BRIEF FOR THE STATE OF WEST VIRGINIA.

As we did not receive the brief of counsel for the State of Maryland before our brief, which has been filed for the State of West Virginia, was printed, we ask leave to file this supplemental brief by way of reply to some of the points made on behalf of Maryland.

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Supplemental Brief for the State of West Virginia.

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First Constitution of Virginia.

It seems to be claimed by counsel for Maryland that Virginia, by her first constitution adopted in 1776, renounced and surrendered to Maryland any claim which might have theretofore been made by either Lord Fairfax or the government of Virginia to any of the territory contained within the Maryland charter, and we presume counsel means by this to claim that Virginia conceded all the claims of Maryland as to the extent of her boundaries.

We submit that this is not the correct interpretation of the language of this constitution. That language is:

> "The territories contained within the charter erecting the colonies of Maryland, Pennsylvania, North and South Carolina are hereby ceded, released and forever confirmed to the people of those colonies respectively, with all the rights of property, jurisdiction and government and all other rights whatsoever which might at any time heretofore have been claimed by Virginia, except the free navigation and use of the rivers Potomac, etc."

Virginia had always claimed, so far as Maryland was concerned, that the granting of the charter to Lord Baltimore was illegal and that she had the right to have it annulled, and that all the territory embraced within that charter rightfully belonged to the Colony of Virginia; and manifestly this constitution simply meant that Virginia did not intend to press this

claim any longer, but to recognize the existence of the State of Maryland according to her rightful boundaries whatever they were, and so far from intending to yield any of the territory, which had been embraced within the survey of Lord Fairfax's grant, it is very clear that Virginia continued to hold up to the line established in 1746, both to the North branch of the Potomac and also to the Fairfax Stone, nobody claiming that by this language of her constitution she had conceded to Maryland the extravagant unwarranted claims which had been put forth in her behalf at one time by Governor Sharpe.

MARYLAND IN HER BRIEF DOES NOT NOW CLAIM TO GO TO THE HEAD OF THE SOUTH BRANCH OF THE POTOMAC, BUT ABANDONS THAT CLAIM AND CONFINES HERSELF TO THE HEAD OF THE NORTH BRANCH.

It will be noticed that in the brief no effort is made to show that the State of Maryland is now entitled to go to the head spring of the South branch of the Potomac. It seems to us when this concession is made the effect of it is necessarily also to concede that the meridian of the first fountain called for in the Maryland charter runs through the head spring at which the Fairfax Stone is located. We have always felt that this must be the case, and it seems to us by the concession made by Maryland in her brief as to the South Branch she has virtually admitted her inability to maintain that claim. She has not made this concession, we presume, because she is convinced that the true source of the Potomac is not at the head spring of the South branch. Why then is the concession made?

Evidently because the State of Maryland recognizes that she cannot maintain this ancient claim, for the reasons:

First: That she is bound by the survey of 1736 and 1746, and by the decision of the king, fixing the boundaries of the Fairfax grant.

Second: That she cannot disturb the long continued possession of Virginia and West Virginia of this territory, because that possession has been so long and continuous that it is conclusive upon the State of Maryland.

Third: Because by her acknowledgment of and acquiescence in the boundaries to which Virginia and West Virginia have

held, and by her laches she has precluded herself from now interfering with them.

THE SAME REASONS WHICH HAVE INDUCED MARYLAND TO ABANDON HER CLAIMS TO THE SOUTH BRANCH COUNTRY SHOULD OPERATE AGAINST HER AS TO THE FAIRFAX STONE AND THE MERIDIAN RUNNING THEREFROM AS HER WESTERN BOUNDARY.

This is true because:

(a) The king's decision settled that the Fairfax Stone stood at the head spring of the Potomac River, just as effectually as it settled that the North branch and not the South branch was the boundary line. This Stone was planted in order to designate for all time the head spring of the Potomac River. If it was the head spring for one purpose, it is the head spring for all purposes. If Lord Fairfax's grant, which calls to go to the head of the Potomac River, runs to and is limited by the Fairfax Stone, so Lord Baltimore's grant, which calls to go to the meridian of the head spring of the Potomac is bounded by and limited to the meridian which passes through the same point. And if Lord Baltimore was bound by the decision of the king, he was bound by the whole decision which established the boundary and fixed the Fairfax Stone as the head of the River.

(b) The possession and governmental control of the States of Virginia and West Virginia up to the meridian of the Fairfax Stone and of the territory West of it has been as complete and exclusive as of the territory South of the North Branch.

(c) The State of Maryland has acknowledged and acquiesced in the meridian of the Fairfax Stone as her boundary line and in Virginia and West Virginia's possession of the territory up to it as fully and uniformly as she has acknowledged and acquiesced in the possession of the South Branch country.

We will discuss this question in connection with the position taken by counsel for Maryland, that neither the Deakins line nor any other line was ever run from the Fairfax Stone as a boundary line between the States, nor acknowledged or acquiesced in as such boundary line.

Was Deakins' Line Actually Run, and Was It Recognized as a Boundary Line?

In the brief of Counsel for the State of Maryland the position is taken in effect that the Deakins line never was run at all, and, if run, it was not a continuous line, and never was authorized or recognized by the State of Maryland as a boundary line; the language of the brief, pages 104 and 105 is as follows:

> "The State of Maryland denies that the Deakins Line is a true North line, and that the same was ever located as a true North line, and that the same was ever located from the Fairfax Stone, and that the same is even a continuous line between any termini, and that there is any evidence in this cause to show these alleged facts or any of them. The Deakins Line, as a boundary line, is a mere myth, and in point of fact, never did exist even as a continuous line between its north and south ends, and far less as a boundary line marking the western boundary of the State of Maryland.
>
> The Deakins line never was authorized or recognized by the State of Maryland as a boundary, and there is absolutely no proof in this case tending to show that Francis Deakins laid out said line. The State has always expressly denied that it was a boundary."

Now the facts are that prior to the running of the Deakins Line there had been a line run north from the Fairfax Stone, and that to this line grants had been made by Virginia, and it had been called for by Maryland grants, and Maryland had never gone beyond this line except in the year 1774, when the old grants were made that appear upon plaintiff's map, and the evidence is clear that Francis Deakins did run a line on the ground and marked it specially, marked trees and objects at the end of each mile. His map shows that there was a due north line from the Fairfax Stone, and that the military lots were laid down adjoining it. This map also shows the mile stations on it, and there is abundant evidence to show that this line was recognized and well known all along its entire length.

The Deakins Line Was Actually Run on the Ground and Recognized by Maryland, and All the People Along It.

(1) The State of Maryland granted the Mount Pleasant Sur-

vey on the 22nd day of May, 1787, two years before the running of the Deakins Line. There is located by Mr. Monroe on his maps the call for the beginning as follows:

> "Beginning at a bounded white-oak standing on the North line drawn from the fountain head of the North Branch of the Potomac River, near the west side of the road leading from Arch's Spring Grant to Tygart's Valley, etc."

Both Mr. Monroe and Mr. Brown have located this beginning point of the Mount Pleasant Survey, and it will be seen that it is located practically on the due north line from the Fairfax Stone. Here is a statement under the hand of the Great Seal of the State of Maryland in 1787 that this white-oak beginning corner of the Mount Pleasant Survey stood "On the north line" and that this north line was drawn from "The fountain head of the North Branch of the Potomac River." The location of the Mount Pleasant Survey, and its beginning corner as made by Mr. Monroe is not disputed in this case. The State of Maryland therefore, two years before the running of the Deakins line, in the most solemn manner recognizes that the Fairfax Stone stood at the fountain head of the Potomac River, and also that a line had been drawn north from that stone. A line had necessarily been drawn, otherwise how could the surveyor who located this Mount Pleasant tract know that this particular white-oak stood on the line drawn from the fountain head north.

(2) *The Act of the Maryland Legislature of 1781, dedicated "All the lands within the State* westward of Fort Cumberland" as bounty lands for the soldiers, and whilst it is true as alleged in plaintiff's brief that Francis Deakins was authorized by the resolution of 1787 to lay out "Such parts of the reservations and back lands belonging to this State lying to the westward of Fort Cumberland as he may think fit and capable of being settled and improved, in lots of fifty acres," yet this evidently authorizes him to exercise his judgment as to the quality of the land, whether it was capable of improvement or not, but did not contemplate that he would leave any that was fit and capable of improvement within the state which had been previously dedicated to the Revolutionary soldiers. In other words, Deakins understood, and the clear meaning of the Statute was, that he was to lay out all the reserves and back lands west of

Fort Cumberland, *within the State*, which was fit and capable of improvement into fifty acre lots for the soldiers. He so understood it. Deakins knew of the existence of the Fairfax Stone, knew that the Virginians had settled up to the meridian line of this stone, and were claiming to it. In fact, he was a citizen of Maryland, acting under the authority of the State of Maryland, under instructions to lay out all the unimproved lands west of Fort Cumberland that were capable of improvement. He laid them out no further westward than the meridian of the Fairfax Stone, and he did that because he believed and recognized that to be the boundary between Maryland and Virginia. If you choose, you may say that he supposed it was, and the Legislature of Maryland in confirming his report acted upon the same supposition. The act confirming Deakins' report and disposing of these bounty lands was passed December 23rd, 1788, and it is found on pages 1308 to 1312 of the printed record. This act, after reciting the previous legislation and the report of Francis Deakins contains the following language on page 1309:

"Be it enacted that twenty-five hundred and seventy-five of the aforesaid lots lying in the most fertile part of the county and contained in the following limits, to-wit: Beginning at the mouth of Savage River and running with the north branch of Patawmack River to the head thereof, then north with *the present supposed boundary line of Maryland* until the intersection of any east line to be drawn from the said boundary line, with a north course from the mouth of Savage River, will include the number of lots aforesaid, to be distributed by lot among the said soldiers, etc."

And in distributing the lots intended for the officers the same language is used, that is, an east line to be drawn "from *the aforesaid supposed boundary line of Maryland.*"

Now whilst it is true that in the same act they state that they believe that this line is within what the State of Maryland can rightfully claim, yet that does not do away with the fact that they have already designated the line run by Deakins from the Fairfax Stone north as the supposed boundary line of Maryland. It cannot be denied therefore that the Legislative branch of the Maryland Government acknowledged in 1788, not only that a line had actually been run on the ground, but that it was

supposed to be the boundary line of the State; and as we have shown in the general brief Maryland never after that went beyond this line until long after the Michler line was run in 1859.

West Point Maryland Survey in 1793.

In 1793, six years after the Deakins line was run, Maryland granted to Major Jno. Swan the "West Point" Tract, containing 461 acres. That grant contains this language:

> "Beginning at a bounded white-oak, cucumber and maple standing north sixty-two degrees and one-half degree, East 363 perches from *the three mile tree on a line North from the head of the north branch of the Potomac River.*"

Here is a statement under the Great Seal of the State of Maryland, not merely that there was a line which had been drawn north from the head of the North Branch of the Potomac River, but that there was a *three mile tree on said line.* The Deakins map shows that he marked the miles on this meridian line. Here is a recognition of one of those miles, and a clear recognition that there was in fact a line run on the ground. This is the same line that was called in the act of the Maryland Legislature of 1788, the "present supposed boundary line of Maryland."

Military Lot No. 1101.

There is distinct evidence in the Deakins report that such a line was run and marked. This is shown by the description of Military Lot No. 1101, the first lot on the line running north from the Fairfax Stone. It is described as follows: (Deakins Report):

> "Beginning at a bounded maple marked 1100, standing *one mile north from a stone fixed by Lord Fairfax for the head of the North Branch of the Potomac River.*"

Now when Mr. Monroe located these lots he found an ancient maple down and marked, and a stone marked 1101, just about one mile north from the Fairfax Stone, surface measurements. How did Francis Deakins know that this maple stood *north* from the Fairfax stone unless he ran *the course* from the stone? How did he know that it stood *one mile* north from the stone unless he *measured* the distance on the ground.

Survey of Tract Called "Maryland" in 1810.

The State of Maryland again recognized this line in 1810 and 1823 by the survey and grant of a tract called "Maryland". Among other calls it has the following:

> "N. 60 degrees West 95 perches to *the Virginia and Maryland line as run by the direction of Francis Deakins at the time of laying out the lots to the westward of Fort Cumberland.*"

This tract was granted to Conrad Nine, as was also the tract called Ninesburg. Now by this patent the State of Maryland solemnly speaks of this Deakins Line as "the Virginia and Maryland line," and there is no question what line is called the Virginia and Maryland line. It states that it is the line run by "Francis Deakins at the time of laying out the lots to the westward of Fort Cumberland." It is almost beyond comprehension that counsel for the State of Maryland assert that no line was run by Francis Deakins and that it never was recognized by the State of Maryland as her boundary line, in the face of these facts.

Siege of Acre Patent in 1831.

Again in 1831 this line was recognized by Maryland in the grant of the "Seige of Acre". The language is:

> "Beginning for the outlines of the whole at a bounded maple standing one mile north from a stone fixed by Lord Fairfax for the head of the north branch of the Potomac River, it being also the beginning tree of Lot No. 1101."

Whippoorwill Patent, 1842.

In 1842 Maryland granted to Jesse Spurgeon the "Whippoorwill" tract on top of the Cherry Hill Survey. The patent uses this language:

> "Beginning at a bounded *spanish oak tree* standing on *the line* said to divide the State of Maryland, from the State of Virginia, etc."

This "Whippoorwill" Survey was about *thirty-two miles from the Fairfax Stone*, yet we find there "a spanish oak standing on the line said to divide the State of Maryland from the State

of Virginia." Here a line is recognized and a tree is found on that line. This survey was made in 1835.

Hammond's Corner Survey—1839.

Then we have in the extreme north end of this line adjoining Pennsylvania a survey made in 1839 for Thomas Hammond, in which the following language is used:

> "Running with part of the third line of Lot No. 2927 North 565 perches to the Pennsylvania line, and with it west 48 perches to *the Fairfax Line*, commonly called *the Virginia line*, and with said line south, etc."

Here we have the Fairfax Line as far north as the Pennsylvania line and we have it called the Virginia line. This is not the act of Thomas Hammond, but it is the act of the State of Maryland through her Governor, her Land Office and under her Great Seal.

Eelshine Patent in 1854.

Upon a survey made in 1849, the State of Maryland made a grant in 1854 of a tract of land called "Eelshine". It uses this language:

> "Beginning at the end of the first line of lot No. 316, and running thence South 26 degrees West 90 perches to the Virginia and Maryland line, then with said line North, &c."

There is no equivocation or ambiguity about this language. Without qualification, the line is called "The Virginia and Maryland Line." Now who is it that makes this declaration? The State of Maryland—by her governor, under her great seal, with the sanction and approval of her land office, thoroughly familiar with the situation. There is no question as to where this Eelshine patent lies. It is located by Mr. Monroe and shown on his map. It adjoins the old Deakins line as claimed by the inhabitants, and is considerably East of the Michler line.

Buckdale Patent 1867; Survey 1848.

In 1848, one year before the running of the Michler line, Maryland surveyed for Jesse J. Ashby a tract called Buckdale, and in 1867 granted him a patent for said tract. Among its calls is the following:

> "South 43 degrees, West 202 perches to a white oak sapling standing on the Virginia line, as shown by William Ashby, and with said line South 60 perches."

Now manifestly in 1848 there was a line known as the Virginia line in this locality. It was pointed out by William Ashby, and the same William Ashby had taken out a patent in Virginia for 300 acres just opposite this Buckdale patent, and running up to the said Virginia line. This at least is a declaration by the State of Maryland and an acknowledgment of the fact of the existence of a Virginia line at that place.

Maryland also granted a tract called "Ninesburg", calling for this same line, and located on it. There is also a tract called "Arabia", granted by Maryland, which does not appear to be in the record, but which lies adjoining and just North of the Granary, and between the Military lots and the old Deakins line and calls for this line. It is dated in the year————.

Maryland Act of 1852 Recognizes This Line.

This act contains the following language:

> "And whereas *the true location of the Western line of Maryland, between the States of Maryland and Virginia, beginning at or near the Fairfax Stone on the North Branch of the Potomac River at or near its source*, and running in a due North line to the State line of Pennsylvania, is *now lost and unknown* and *all the marks have been destroyed by time or otherwise;* and whereas the States of Virginia and Maryland have both granted patents to the same tracts of land at or near the supposed line, &c., &c."

This act does not say that the Western line of Maryland had never been run—does not say that it had never been marked or ascertained. On the contrary it distinctly recognized that there had been a Western boundary line, that it had a location, that it had a well defined beginning, viz: "at or near the Fairfax Stone on the North Branch of the Potomac River at or near its source;" that it had a course and distance, viz: "running in a due North line to the State line of Pennsylvania;" that it had not only been run, but that it had been *marked;* but says

that its true location "is now lost and unknown and all the marks have been destroyed by time or otherwise."

Now what line is here spoken of? What line beginning at or near the Fairfax Stone and running North to the Pennsylvania line, had been run and marked on the ground? Evidently it was one which had been run and marked a long time; it had been so long that the marks had been destroyed by time. What line was this? It must have been the Deakins line. Deakins had run such a line—at least his map and report which were on file in the Land Office of Maryland so stated. It was this line that Maryland had called for in several patents granted after it was run, and to which the Virginia patents had extended. Deakins had marked this line by mile trees. The line itself shows the mile divisions and the evidence shows that the mile trees were marked. At all events this act says in effect that there had been a Western boundary line of Maryland located and marked on the ground, and that it began at or near the Fairfax Stone and ran due North to the Pennsylvania line.

Maryland Constitution of 1851 Recognizes the Fairfax Stone.

This constitution provides:

> "When that part of Alleganey County, lying South and West of a line beginning at the summit of Big Back Bone or Savage Mountain, where that mountain is crossed by Mason & Dixon line, and running thence by a straight line to the middle of Savage River, where it empties into the Potomac River, thence by a straight line to the nearest point or boundary of the State of Virginia, thence with said boundary to the Fairfax Stone shall contain a population of ten thousand"—it may be erected into a new county.

This recognizes the Fairfax Stone as a point in the boundary.

From the foregoing facts and other facts and circumstances, which might be adduced, it seems to us that there can be no further question that Francis Deakins did run a line North from the Fairfax Stone; that he ran it as showing the limits beyond which he did not feel authorized to go in laying out lands within the State of Maryland; that the Maryland Legislature spoke of this line as the present supposed boundary line of Maryland;

that by her subsequent patents all along this line from the one mile tree to the Pennsylvania line she calls for and recognizes this line and treats it as the boundary line between the two States, and that by her act of 1852; she recognized that there had been such a line; that it was the true boundary line between the States, and that the marks upon it had been lost and destroyed. What more is needed to show, first, that there was a line run; second, that it was marked, and, third, that Maryland recognized it as a boundary line between the States, we cannot conceive.

Now we have shown by the evidence the present location of this line. As at present located, it is not a straight line nor a due North line. It evidently was not a due North line, in the astronomical sense, when run. Mr. Monroe ran his reference line by the compass needle clear through. It was not a due North line and was not expected to be. The Deakins line was run with the same sort of an instrument and with evidently a little different variation and verged a little farther to the East than the Monroe line, but it was intended to be a due North line. The offsets in it are easily accounted for by the fact that Deakins tied the lots on to the old surveys, and the location of these old surveys is very doubtful and problematic. According to their method of surveying, a shifting of the lines of these old surveys a few rods East or West may be expected, and no two surveyors would run them alike. There are no natural objects called for after the beginning corner, and if the beginning corner was lost or mistaken the whole survey would be out of place. We have no doubt that this accounts for the Military lots in some places lying considerably East of the line as recognized by the people.

The Deakins Line Not Actually Run in This Case.

We understand counsel for the State of Maryland to take the position that West Virginia is precluded from asking the Court to establish the Deakins line because the surveyor in this cause did actually run it out on the ground. They seem to take the position that a party cannot ask the Court to establish a line that has not been fully surveyed, although numerous points on that line have been located and a line drawn on the map through those points. We do not know upon what principle this position is based. We have always understood that a sur-

vey is merely evidence by which the Court ascertains what objects there are upon the ground, and that in order to locate a line between two points, unless you want to get the distance, it is only necessary to locate the points and then the line locates itself, being the shortest distance between two points. Now, the surveyor on behalf of West Virginia, and Mr. Brown, the surveyor on behalf of Maryland, have located more than fifty points in this old Maryland or Deakins line. We did not think it necessary, after locating these points, to go back to the Fairfax Stone and go over the ground between the points, but thought that we had the right to draw upon the map the line between these points. This is what was done. If there is any rule of practice in this Court, which prohibits the Court from establishing a line that has not actually been run throughout its whole extent upon the ground, we were not aware of it. Such is not the practice in the Courts to which we are accustomed, and we take it that if such is the rule in this Court it will give us an opportunity to go upon the ground and run this line between the several points, which we have located, before rendering its final decree in the cause; but we can hardly think that there is any such rule.

Adverse Possession and Acquiescence!

Upon the question of adverse possession and acquiescence, the case of Rhode Island v. Massachusetts has been cited. In that case commissioners had been appointed by both states with full power to settle the disputed boundary between them. These commissioners were appointed in 1710 and again in 1718. Prior to that time a stake had been set up by Woodward and Saffrey three miles from the head of the branches of Charles River. These commissioners adopted a line running through that stake, and it was subsequently ratified and adopted by the Legislature of each state. Massachusetts took and held possession up to the line so established after that time until the bringing of the suit. In 1749 commissioners appointed on behalf of Rhode Island reported that the Woodward & Saffrey line was seven miles from the Charles River instead of three as called for in the charter, and they measured a line three miles from a certain place on the main body of the river. From the year 1750 repeated steps were taken by Rhode Island in various Legislatures and by appointing

commissioners at various times to ascertain and run the line in connection with commissioners to be appointed by Massachusetts. Commissioners from both colonies met more than once but they could make no arrangement changing the line as established under the agreement of 1711 and 1718. Rhode Island alleged a mistake in her commissioners in the place of beginning, as the ground of these efforts, it being claimed that the commissioners on behalf of Massachusetts represented that the Woodward and Saffrey station was within three miles of Charles River, and her commissioners relied upon this statement, so that from time to time, up to 1825 Rhode Island adopted resolutions, appointed commissioners to meet those which should be appointed from Massachusetts for the adjustment of this disputed line, but Massachusetts adhered to the agreements, and finally Rhode Island brought this suit in the year 1832. Under this state of facts the court held that it was not clear as to what was the proper construction of the charter of Massachusetts, when it called for a line to run three miles South of Charles River or of any and every part thereof. As to whether it meant three miles south of the main body of the river, or three miles south of the heads of the tributaries or water shed draining into the river was not clear, and that men of equal intelligence might differ as to the true meaning of the instrument. The Court says:

> "That Massachusetts more than two hundred years ago construed the charter as her counsel now construe it, is clear, and the facts proved authorize the conclusion, and this construction was not for many years opposed by Connecticut or Rhode Island, and at no time by Plymouth."
>
> *Rhode Island* v. *Massachusetts*, 4 How. 637.

The Court also quotes the opinion of Lord Mansfield, who was consulted by Connecticut about this same matter, in which he uses this language:—

> "I am of the opinion that in settling the above mentioned boundary the Crown will not disturb the settlement by the two provinces so long ago as 1713. I apprehend His Majesty will confirm their agreement, which of itself is not binding on the Crown, but neither province should be suffered to litigate such an amicable compromise of doubtful boundaries."

The Court then says:

> "From the settlement referred to up to the time this opinion was given by Mr. Murray, forty-one years only had elapsed. And if that time was sufficient to protect that agreement, with how much greater force does the principle apply to the agreements under consideration, which are protected by the lapse of more than a century and a quarter. More than two centuries have passed since Massachusetts claimed and took possession of the territory up to the line established by Woodward & Saffrey. This possession has ever since been steadily maintained under an assertion of right. It would be difficult thus to disturb a claim sanctioned by time, however unfounded it might have been in its origin."

And in the conclusion of the opinion the Court uses the language quoted in the former brief on page 393.

While this case was decided by the Court mainly upon the ground that the boundary had been fixed and settled by the old agreements between the colonies, and that it was not clear that a mistake had been made in that settlement; yet the Court distinctly lays down the principle, and relies upon it, that where a boundary line has been adhered to by one of the parties, and the matter has been allowed to rest for a great number of years, the Court will not disturb the status, *whether the line was fixed by agreement or in some other manner.* The thing that influences the Court is the inequity and injustice that will result from disturbing a condition which has existed a great many years, and therefore *the Court does not look into the question as to whether the boundary line was properly and regularly established or not.* If it was established by agreement the Court will not look into the question as to whether a mistake was made in the agreement, or whether for any other reason it was improperly obtained. *If it was established by one of the parties without the concurrence of the other, and possession was taken and held to it, by the party who established it, for a long period of time, the acquiescence of the other party will be conclusively presumed, and it will not be heard to allege that the line was not properly located.* The mere fact that the other party,

after a long time, asserts that a mistake has been made and requests the appointment of commissioners, and adopts resolutions protesting against the occupation of the territory, does not relieve it from the consequences of the conclusion of the law that it has acquiesced in the situation. In the case of Rhode Island vs. Massachusetts as above stated, the State of Rhode Island, after 1750, and up to the time of the bringing of the suit, from time to time for about 80 years, protested and appointed commissioners, and Massachusetts in compliance with her requests also appointed commissioners, but Massachusetts all the time held to the line fixed by the agreements, and the Court refused to disturb the status which had existed so long.

The same doctrine is laid down and acted upon by this Court in the case of *Virginia* v. *Tennessee*, 148 U. S., 502, and *Indiana* v. *Kentucky*, 136 U. S., 479, and in *Missouri* v. *Iowa*, 7 How., 660 and same case 10 How., 1. In the case of *Indiana* vs. *Kentucky*, 136 U. S., 479, the question involved was whether an Island known as Green River Island on the Indiana shore belonged to Kentucky or Indiana. In this case there was no compact or agreement, but the question primarily turned upon the construction of the act of Virginia in ceding to the United States the Northwest Territory. There was considerable doubt as to whether this had originally been an island in the Ohio River or part of the mainland as it appeared at the time of the suit. But it was shown that Kentucky had always exercised governmental jurisdiction over the Island and that Indiana had never had any possession of it at all and had not questioned Kentucky's right to it until a short time before she brought the suit.

The Court says:

> "This long acquiescence in the exercise by Kentucky of the dominion and jurisdiction over the Island, is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the exercise of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome except by the clearest and most unquestioned proof. It is a principle of public law universally recog-

> nized that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it is conclusive of the nation's title and rightful authority."
>
> *Indiana* v. *Kentucky*, 136 U. S., 479—See opinion by Mr. Justice Field.

We respectfully submit therefore that a state cannot prevent the application of the doctrine of laches and acquiescence by merely passing resolutions asserting claims to disputed territory and protesting against the occupation by another state, and by requesting the appointment of commissioners from time to time, nor even by inducing the other state to also appoint commissioners to confer with hers for the settlement of her claims if the other state remains in complete possession and control of the territory meanwhile. This is the doctrine between individuals, and the same principle of equity which has established it as an equitable doctrine between individuals, requires it also to be established between two states of the Union. If I am in possession of a body of land up to a certain line, and continue to hold that position for the period of limitation, or for such period as a Court of Equity will apply the doctrine of laches and acquiescence, my neighbor cannot preserve any right which he may claim in the land held by me, simply by protesting, making claims, asking for conferences with me, or having his attorney meet mine for the purpose of adjusting the dispute; if he wants to preserve his rights he must bring such conferences to a conclusion, and if he cannot get me to conclude them, he must resort to the courts within a reasonable time.

Now whatever may be the doctrine laid down by the writers on international law, as between independent nations, with reference to preserving their rights by protest and negotiation, such doctrine can have no application to the states of this Union. There is no tribunal to which independent nations may resort for a *peaceable settlement* of such disputes, and therefore their only resort is either to war or to protest and negotiation; but under the Constitution of the United States as interpreted by this Court any state of the Union has a right to bring a suit in this Court for the settlement of a disputed boundary with a sister state. Therefore in this respect the states of the Union

stand in relation to each other upon the same footing that the citizens of any state stand to each other. If their rights are invaded they can bring suit for their vindication. Therefore, having this remedy, effectual and speedy, they must resort to it if they would prevent the application of the doctrine of acquiescence and laches.

Now in this case, prior to 1789, a line had been run north from the Fairfax Stone, the Fairfax Stone having been fixed at the head spring of the Potomac River, and the meridian of that spring being one of the points in the boundary of Lord Baltimore's charter. This head spring had been established by the planting of the Fairfax Stone in 1746. Between that date and 1789 this north line had been run. Maryland had issued, certainly two, (Mt. Pleasant and West Point) and probably more, patents calling for this north line, and Virginia had granted the land along this north line for several miles calling for it as the boundary line between Maryland and Virginia. In 1789 a line was run by Deakins from this stone north under the authority of the State of Maryland, and after it was run Virginia claimed all the territory along it that had been previously granted to her citizens, and they took possession of it and have held it, lived on the lands, cleared it up, raised their families, established schools, churches, villages and formed all the attachments which belonged to owners of the soil, and Maryland never attempted any disturbance of this possession, jurisdiction and enjoyment from 1789 up to 1881, when she granted White Rock to Browning. But on the contrary she made quite a number of grants of territory calling for this line as a line between the states, and recognized it in various ways, and although she protested from time to time, not so much against this line as against the loss of what she claimed of her right to go to the head spring of the South Branch of the Potomac, and although she passed resolutions and made protests and appointed commissioners, yet she brought no suit except one in 1832, which she dismissed, but allowed Virginia and her citizens, and West Virginia and her citizens to hold this territory unmolested. We submit that the principles above mentioned apply with peculiar force to this case.

There are a number of other points in the brief of counsel for

the State of Maryland, which we think are not tenable, but will not enlarge this supplemental brief by discussing them, but will endeavor to point them out in the oral argument.

Respectfully submitted,

WILLIAM G. CONLEY,
Attorney General of West Virginia.

GEORGE E. PRICE,
Special Counsel for West Virginia.

THE STATE OF MARYLAND,	In the
vs.	Supreme Court of the
THE STATE OF WEST VIRGINIA.	United States.
THE STATE OF WEST VIRGINIA	OCTOBER TERM, 1909.
vs.	
THE STATE OF MARYLAND.	No. 1, ORIGINALS.

In the Matter of the Decree in the Above Cause.

DECREE PROPOSED BY THE STATE OF MARYLAND.

To the Honorable, the Judges of
the Supreme Court of the United States:

The State of Maryland prays that the decree to be entered by the Court in the above cause shall be in the following form, to wit:

The State of Maryland vs. The State of West Virginia.	In The Supreme Court of the United States In Equity. No. 1, Original.

DECREE.

This cause came on to be heard at this term and was argued by counsel; and thereupon on consideration thereof it was adjudged and decreed as follows:

First. That the true boundary line between the States of Maryland and West Virginia is the southern bank of the Potomac river at high water mark, extending from the Virginia line at or near Harper's Ferry, with the said Potomac river, and with the north branch of the said Potomac river at high water mark along said southern bank to the point on said southern bank of said north branch of said river at high water mark, where the north and south line from the Fairfax Stone, reaches the said high water mark on said southern bank of said north branch of the Potomac river, and thence running across said river at said point and running northerly as near as may be along the line recognized and adopted by the people residing about or near the same as the boundary line between the said States of Maryland and West Virginia, said line being at some points known as the Deakins line, and at some points as the Old State Line, to the southern border or boundary line of the State of Pennsylvania.

Second. That Julius K. Monroe of West Virginia, William McCulloh Brown of Maryland, and Samuel S. Gannett of the United States Geological Survey, be and they are hereby

appointed Commissioners to run, locate, establish and permanently mark with suitable monuments, the line aforesaid as the boundary line between the States of Maryland and West Virginia from said point on said southern bank of the north branch of the Potomac River to said Pennsylvania line, in accordance with the Opinion of this Court heretofore filed in this case and with this decree. Said Commissioners shall mark said line as run, located and established by them, with suitable stone monuments, at reasonable and proper intervals, according to the topography of the Country.

It is further ordered that before entering upon the discharge of their duties, each of said Commissioners shall be duly sworn to perform faithfully, impartially and without prejudice or bias the duties herein imposed; said oath to be taken before the Clerk of this Court, or before either of the Clerks of the Circuit Courts of the United States for the District of Maryland or for the northern district of West Virginia, or before any officer authorized by law to administer an oath in the State of Maryland or West Virginia, and returned with their report; that said Commissioners may arrange for their organization, their meetings and the particular manner of the performance of their duties and are authorized to adopt all ordinary and legitimate methods in the ascertainment of the true location of said boundary line, including the taking of evidence under oath and calling for papers and documents, but in the event evidence is taken, the parties shall be notified and permitted to be present and examine and cross-examine the witnesses; and all evidence taken by the Commissioners and all exceptions thereto and action thereon shall be preserved and certified and returned with their report.

Said Commissioners are also at liberty to refer to and consult the printed record in the cause so far as they may think proper to enable them to discharge their duties under this decree.

It is further ordered that the Clerk of this Court shall at once forward to the Governor of each of said States of Mary-

land and West Virginia, and to each of the Commissioners appointed by this decree, a copy of this decree duly authenticated. And said Commissioners are authorized, if they deem it necessary, to request the co-oporation and assistance of the State authorities in the performance of the duties imposed on them by this decree.

It is further ordered that said Commissioners do proceed, with all convenient dispatch, to discharge their duties in running, locating, establishing and marking said line as herein directed, and make their report thereof and of their proceedings in the premises to this Court on or before the first day of January, 1911, together with a complete bill of costs and charges annexed.

It is further ordered that should vacancies occur in said Board of Commissioners by reason of death, the refusal to act, or inability to perform the duties required by this decree, the Chief Justice of this Court is hereby authorized and empowered to appoint other Commissioners to supply such vacancies and he is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered that all the costs of the proceedings by said Commissioners under this decree, including a remuneration of not exceeding fifteen dollars ($15.00) per day for each Commissioner whilst actually engaged in the performance of his duties hereunder, and the other costs incident to the running, locating, establishing and marking said line, shall be paid by the States of Maryland and West Virginia equally.

Third. That the cross-bill of the State of West Virginia, in so far as it asks for a decree fixing the north bank of the Potamac river as the boundary line between said States, be and the same is hereby dismissed.

Fourth. That this decree shall not be construed as abrogating or setting aside the Compact made between Commissioners of the State of Maryland and the State of Virginia at Mount

Vernon on the 28th day of March, 1785, and which was confirmed by the General Assembly of Maryland, and afterwards by an Act of the General Assembly of Virginia passed on the 3d day of January, 1786, but the said compact, except so far as it may have been superseded by the provisions of the Constitution of the United States, or may be inconsistent with this decree, shall remain obligatory upon and between the States of Maryland and West Virginia, so far as it is applicable to that part of the Potomac river which extends along the border of said States, as ascertained and established by this decree.

Fifth. That all the costs of this case and the proceedings therein as the same shall be taxed by the clerk of this Court and including also the costs of the surveys made by the two States under the order or orders of this Court, said costs for said surveys to be ascertained and taxed by the clerk of this Court upon vouchers sworn to and exhibited to him, shall be equally divided between the said two States.

ISAAC LOBE STRAUS,
Attorney-General of the State of Maryland.

ARGUMENT.

The above decree, proposed by the State of Maryland, differs from the decree proposed by the State of West Virginia in *two* respects, namely:

1. It ascertains the *high water mark* upon and along the southern bank of the Potomac River and of the North Branch thereof, as the *southern* boundary of Maryland; whereas the decree proposed by West Virginia fixes *the low mark* along said bank as said boundary.

2. Maryland claims that under this Court's determination, as expressed at the conclusion of the opinion rendered by Mr. Justice Day, respecting the costs, namely, "*costs to be equally divided between the States,*" there should be included in the estimate of the costs the costs of the surveys made by the two States under the orders of this Court, in the course of and as a part of the proceedings in the case. The State of Maryland submits that the costs of making these surveys, which were not only important and necessary, but are of the very warp and woof of the case, are just as much a part of the costs of the case itself as the expense of taking testimony and of printing the record in the case. The ascertainment of the boundary between the two States, which prior to the decision of this case had *always been unsettled,* is not a subject of litigious interest but a matter of mutual and public advantage to the two States, and all the legitimate costs incurred in connection with the necessary and esssential proceedings therein, should, it is respectfully submitted on the part of Maryland, be included in the costs, which the Court has equitably held, shall "be equally divided between the States."

I.

The Decree Should Fix the Southern Boundary of Maryland at and Along the High-water Mark on the Southern Bank of the Potomac.

We think the opinion of Mr. Justice Day is conclusive on this point in favor of the State of Maryland. The opinion in this respect is as follows:

> "As to the contention made by West Virginia in her cross-bill, that she is entitled to the Potomac River to the north bank thereof, *we think that claim is disposed of by the case of Morris vs. United States, 174 U. S. 196, already referred to.* In *that case,* among other things, there was a controversy between the heirs of James H. Marshall and the heirs of John Marshall as to the *ownership of the bed of*

the Potomac River from shore to shore, including therein certain reclaimed lands. Claims of the one set of heirs was based upon the charter of Lord Baltimore of June, 1632, and that of the others upon the grant of King James II to Lord Culpeper, afterwards owned by Fairfax, to which we have already referred.

"After making reference to the award of the commission to fix the Virginia and Maryland boundary, appointed in 1877, fixing the line and boundary at low-water mark on the Virginia shore, *to which arbitration the State of West Virginia was not a party*, this Court disposed of the controversy, *irrespective of that award*, in the following language, used by Mr. Justice Shiras in delivering the opinion of the Court:

"'Whether the result of this arbitration and award is to be regarded as establishing what the true boundary always was, and that therefore the grant to Thomas, Lord Culpeper, never of right included the Potomac River, *or as establishing a compromise line, effective only from the date of the award, we need not determine.* For, *even if the latter be the correct view*, we agree with the conclusion of the Court below, that, upon all the evidence, the *charter granted to Lord Baltimore, by Charles I, in 1632, of the territory known as the province of Maryland, embraced the Potomac River and soil under it, and the islands therein, to high-water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper.*

"'The record discloses no evidence that, at any time, any substantial claim was ever made by Lord Fairfax, heir at law of Lord Culpeper, or by his grantees, to *Property rights in the Potomac River, or in the soil thereunder*, nor does it appear that Virginia ever exercised the power to

grant ownership in the islands or soil under the river to private persons. Her claim seems to have been that of political jurisdiction.'

"*We think this decision disposes of and denies this claim of the State of West Virginia in her cross-bill.*"

Whilst we think it unnecessary to go beyond the opinion of Mr. Justice Day, above cited, and the decision of this Court, expressly on the point in *Morris vs. United States, 174 U. S. 196*, as fully sustaining the claim of Maryland, it is respectfully pointed out that the language of the Maryland Charter of 1620, leaves no doubt on the point.

The language, as the Court will remember, is :

"Deinde vergendo versus Meridiem *ad ulteriorem* dicti *Fluminis Ripam et eam* sequendo qua Plaga," *etc.*

This language clearly carries Maryland to the *high-water* line on the farther bank.

See the "opinion of the Court below," referred to in Morris vs. United States, in 23 Washington Law Reporter, 745, cited in full in Maryland's main brief in this case.

In Stone vs. Augusta, 48 Me. 127, one of the boundaries of land conveyed by a deed was thus described in the conveyance : "thence to mill brook ; thence by the *bank* of said brook to," etc. It was held that the grantee's land was bounded by ordinary high-water mark. The Court said :

"The plaintiff is bounded by the *bank* of the brook. By this term is understood what contains the river in its natural channel when there is the greatest flow of water. 1 Bouvier's Law Dict. The obvious intention was to include the stream itself or the bed thereof. The owner may sell the land without the privilege of the stream, as he will if he bounds his grant by the bank. Hatch vs. Dwight, 17 Mass. 289.

"The plaintiff 's land is, therefore, bounded by ordinary high water mark, and this principle will not be changed

by the fact that the land or bank continues to rise more or less precipitously above that point."

Bouvier L. Dict., Def. *Ripa:*

"*Ripa* (Lat.): The banks of a river, or the place beyond which the waters do not in their natural course overflow."

Dig. 43, 12, 3:

"*Ripa ea putatur esse, quae plenissimum flumen continet.*"

1 Corp. Jur. Civ. (Krueger & Mommsen, 6th Ed.), 687.

That is considered to be the bank which bounds the river when *fullest.*

In the case of Paine Lumber Co. vs. United States, 55 Fed. 854, 864, the term "bank" is clearly defined. Jenkins, District Judge, there said:

"The bank of a river is that elevation of land which confines the waters of the river in their natural channel when they rise the highest and do not overflow the banks."

In U. S. vs. Pacheco, 2 Wallace, 587, Mr. Justice Field at page 590 of the opinion of the Court, said:

"The position, that by the bay as a boundary is meant in this case, the line of low water mark, is equally unfounded. By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water mark, the land over which daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails. And there is nothing in the language of the decree which requires the adoption of any other rule in in the present case.

"If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the

Mexican Government, the result will be equally against the position of the appellants."

See also—Howard vs. Ingersoll, 13 Howard, at pages 415 to 419, per Mr. Justice Wayne.
Kean vs. Stetson, 5 Pickering, 494.
3 Kent's Commentaries, Star page 427.

What was said in Handley's Lessee vs. Anthony, 5 Wheaton, 374, is wholly inapplicable to the point or boundary here under consideration, in which connection see—

3 Kent Commentaries, Star pages 431-2:

> "In Handley's Lessee vs. Antony it was considered as a general, natural and convenient rule of construction in public grants of territory bounded by *a river,* instead of being bounded by the bank or shore, to take the permanent river for the boundary line, and that would, of course, carry the line to ordinary low-water mark, and include the land left diurnally bare by the receding of the water. The rule was in that case applied to a county or State bounded by a river; and the English common law does not allow the riparian owner, under the grant of the sovereign of lands bounded on tide waters, to go beyond ordinary high-water mark."

In Anderson's Dictionary of Law, page 104 (Ed. 1889), the term "Bank" is defined as follows:

> "BANK—(1) The earth bordering a water course, *q. v.*
>
> "The banks of a river are the earth which contains it in its ordinary state to high water."

In the case of The People *ex rel.* vs. Board of Supervisors, 125 Ill. 9, 25-26, the Court said:

"The description of the line is 'to Gordon's branch; thence *down the meanderings of said* branch to the margin of Cahokia creek; thence *down on the left bank of Cahokia creek,'* etc. If this does not clearly say that the line shall run '*down on the left bank* of Cahokia creek,' then it would seem impossible to express that idea. There is no ambiguity in the language, and we are aware of nothing to prevent its having its usual effect, in this connection.

"But it is further contended by counsel for respondents, that even if it shall be held that the line does not run in the middle of the stream, it must be held that it runs where the water and land meet at low water. But low-water mark is not the *bank* of a stream. It is the point to which the stream recedes at its lowest stage. The banks of the stream, on the other hand, are 'the elevations of land which confine the waters in their natural channel, when they rise the highest and do not overflow the banks.' (Gould on Waters, sec. 45.) In Howard vs. Ingersoll, *supra,* Wayne, J., in speaking of the like question there under consideration, said: 'The call is for the bank,—the fast land which confines the water of the river in its channel or bed, in its whole width. That is to be the line. The bank, or the slope from the bluff, or perpendicular of the bank, may not be reached by water for two-thirds of the year; still the water-line impressed upon the bank above the slope is the line required by the commissioners, and the shore of the river, though left dry for any time, and but occasionally covered by water in any stage of it, to the bank, was retained by Georgia as the river up to that line.' "

See also—

Brown vs. Heard, 85 Me. 294.

II.

It is submitted that the determination of the boundary between the two States is a public matter concerning them in their Sovereign character, and not of a litigious nature or interest. It is a subject of common and general importance to the people of each State in their organic or corporate relations with one another, as well as a matter of moment in their relations to each other under the Federal Constitution, which for reasons, obviously of high import, provides for the settlement of such a controversy in this Court.

The surveys ordered by this Court were an absolutely indispensable part of the proceeding, probably more important than any other feature of the case, as an aid to the Court in its adjudication of the questions presented. They were just as much and as necessary a part of the case as the taking of testimony or the printing of the Record. Under such circumstances the costs of these surveys, ordered by the Court, should be treated as part of the costs of the case, and in a proceeding of this character between Sovereign Commonwealths for public, governmental purposes, all the costs should be equally divided between the Sovereign parties.

It is believed the costs of the surveys made by Maryland were greater than those made by West Virginia. But the surveys by both States were undeniably made in good faith and without excessive outlay.

An inspection of the voluminous printed Record in this case will show that the documentary matters introduced by West Virginia exceeded in printed extent those introduced by Maryland. Yet this presents no reason why West Virginia should contribute more than Maryland to the cost of the Record. The same principle of equality should apply to the costs of the surveys. They should be borne equally by both States.

The point was expressly so decided in—

Whipple vs. Cumberland Cotton Manufacturing Company, 3 Story's U. S. Circuit Court Reports, 84.

In that case it was laid down that where a survey was ordered by the Court, the expenses thereof were to be borne equally by both parties, since it was for their mutual benefit. In deciding the case, the Court held:

> "On the last point, the expenses of the survey were to be borne equally by both parties, since it was made for their mutual benefit, and was necessary to the true understanding of the cause on both sides."

And see also—

New Hampshire Land Co. vs. Tilton, 29 Fed. Rep., pages 765-6.

In Nebraska vs. Iowa, 143 U. S. 359, this Court, at the close of the opinion, on page 370 of the report, laid down the rule governing the award of costs in a case of this character, as follows:

> "*The costs of this suit will be divided equally between the two States,* because the matter involved is one of those governmental questions in which each party has a real and vital, *and yet not a litigious,* interest."

And the decree in that case was entered accordingly. See—

Same Case, 145 U. S. 519, 521.

And so it was held in Peper vs. Fordyce, 119 U. S. 471 (citing R. R. Co. vs. Swan, 111 U. S. 379, and Hancock vs. Holbrook, 112 U. S. 229), that

"upon a reversal for want of jurisdiction in the Circuit Court, this Court may make such order in respect to the costs of the appeal as justice and right shall seem to require."

In Maryland it is the invariable practice to include surveyor's fees as part of the costs. In the case of Andrews vs. Scotton, 2 Bland, 629, 662, where it was held that surveyor's fees are a part of the costs, Chancellor Bland declared:

"It is very clear, that if the surveyor had made out a bill of his legal fees upon the plot and certificate returned by him on the 19th of March, 1823, they would have been taxed by the register as a part of the costs properly incident to the order of the 17th of April, 1823, from which Anderson appealed; and consequently, would, with the other costs arising out of the same controversy, have been ordered by the Court of Appeals, in their affirmance of that order of the 16th of July, 1825, to be paid by Anderson. * * * It is evident, that these fees ought to have constituted a part of the costs which Anderson was ordered to pay by the judgment of the Court of Appeals; but now, in this stage of the proceeding, after the affirmance of the order of the 17th of April, 1823, this Court has no power to open that judgment, so as to let in these costs as a part of it; nor can this Court now, in this summary way, enforce the payment of any sum of money which ought to have formed a component part of that judgment, and which had been omitted by the negligence of the party himself."

In the case of Lillienthal vs. Southern California Ry. Co., 61 Fed. Rep. 622, it was held that the expense of maps necessarily introduced at the trial was taxable.

The same rule has been established in South Carolina.

Sturzenegger vs. Marsh, 1 Bailey (S. Car.), 592;

Breithaupt vs. Clarke, 1 Hill's Law Reports (S. Car.) 399.

In Tug River Coal & Salt Co. vs. Brigel (1895, 6th Cir.), 14 C. C. A. 577, 67 Fed. 625, the Court said:

> "Appellant has had the entire record brought up and printed. Appellant made no objection to jurisdiction in the Circuit Court, and did not call the Court's attention to lack of jurisdiction. While the defendant appellant must recover costs in the Court below, we do not think it should be allowed full costs in this Court. The costs of the appeal will be divided equally."

In Tug River Coal & Salt Co. vs. Brigel (1895), 17 C. C. A. 367, 70 Fed. 647, a motion to modify the judgment as to costs in same case was denied.

In Tefft vs. Stern (1896, 6th Cir.), 21 C. C. A. 73, 74 Fed. 755, the Court said:

> "The third motion, asking for an apportionment of the costs, is impracticable, and would throw upon the Court the burden of separating and apportioning the costs, as between the plaintiffs in error and the defendant, in all cases where a part of the judgment of the lower Court was adjudicated to be correct, and other parts erroneous, and a reversal had thereon. Defendant in error's motion will be therefore overruled."

In Willis vs. Terry (1899, E. D. Pa.), 98 Fed. 8, Judge Dallas said:

> "It has been strenuously urged by each party that the master erred in reporting that the costs of the

reference should be equally divided between them, but I think it was right. My first impression was that, inasmuch as the plaintiff had filed thirteen exceptions, and had succeeded in maintaining but one of them, he ought to be required to pay a somewhat greater proportion of these costs; but on further reflection I have reached the conclusion that, as the answers were plainly insufficient in one particular, which alone justified objection to them, the respondents may fairly be charged with one-half of the expense of the investigation."

In Swift & Co. vs. Kortrecht (1902, 6th Cir.), 50 C. C. A. 429, 112 Fed. Rep. 709, the Court said:

"The provision in the decree requiring Swift & Co. to pay one-half the costs is also complained of. The matter of costs rests largely in the discretion of the chancellor, and his determination will not be reversed unless it is manifestly arbitrary and unreasonable. In the present instance we see no reason for thinking that the discretion of the Court below was improvidently exercised."

ISAAC LOBE STRAUS,
Attorney-General of Maryland.

IN THE

SUPREME COURT OF THE UNITED STATES.

NO. 1 ORIGINAL.

THE STATE OF MARYLAND
v.
THE STATE OF WEST VIRGINIA. } *Equity.*

DECREE.

This cause came on to be heard at this Term and was argued by Counsel; and thereupon on consideration thereof it was adjudged and decreed as follows:

First: That the true boundary line between the States of Maryland and West Virginia is ascertained and established as follows:

Beginning at the common corner of the States of Maryland and Virginia on the Southern bank of the Potomac river at low water mark at or near the mouth of the Shenandoah River, and running thence with the Southern bank of the said Potomac River, at low water mark, and with the Southern bank of the North branch of the Potomac River at low water mark, to the point where the North and South line from the Fairfax Stone, crosses the said North branch of the Potomac, and thence running Northerly, as near as may be, with the said Deakins or Old State line to the line of the State of Pennsylvania.

Second: That Julius K. Monroe, William McCulloch Brown, and Samuel S. Gannett be, and they are hereby appointed commissioners to run, locate and establish and permanently mark with suitable monuments the said Deakins or Old State line as the boundary line between the States of Maryland and West Virginia from said point on the Southern bank of the North Branch of the Potomac River to the said Pennsylvania line in accordance with the opinion of this Court heretofore filed in this case and with this decree, the said line to be run and located as far as practicable as it has been gen-

erally recognized and adopted by the people residing about or near the same as the boundary line between the said States, and not as conforming, except to a limited extent, to the Western boundary of the Maryland Military Lots as said lots are now located and held. Said Commissioners shall mark said line as run, located and established by them, with suitable stone monuments, at reasonable and proper intervals, according to the topography of the country.

It is further ordered that before entering upon the discharge of their duties, each of said Commissioners shall be duly sworn to perform faithfully, impartially and without prejudice or bias the duties herein imposed; said oath to be taken before the Clerk of this Court, or before either of the Clerks of the Circuit Courts of the United States for the District of Maryland or for the Northern District of West Virginia, or before an officer authorized by law to administer an oath in the State of Maryland or of West Virginia, and returned with their report; that said Commissioners may arrange for their organization, their meetings and the particular manner of the performance of their duties and are authorized to adopt all ordinary and legitimate methods in the ascertainment of the true location of said boundary line, including the taking of evidence under oath and calling for papers and documents, but in the event evidence is taken, the parties shall be notified and permitted to be present and examine and cross-examine the witnesses; and all evidence taken by the Commissioners and all exceptions thereto and action thereon shall be preserved and certified and returned with their report.

Said Commissioners are also at liberty to refer to and consult the printed record in the cause so far as they may think proper to enable them to discharge their duties under this decree.

It is further ordered that the Clerk of this Court shall at once forward to the Governor of each of said States of Maryland and West Virginia, and to each of the Commissioners appointed by this decree, a copy of this decree duly authenticated. And said Commissioners are authorized, if they deem it necessary, to request the cooperation and assistance of the State authorities in the performance of the duties imposed on them by this decree.

It is further ordered that said Commissioners do proceed, with all convenient dispatch, to discharge their duties in running, locating, establishing and marking said line as herein directed, and make their report thereof and of their proceedings in the premises

to this Court on or before the first day of January, 1911, together with a complete bill of costs and charges annexed.

It is further ordered that should vacancies occur in said Board of Commissioners by reason of death, the refusal to act, or inability to perform the duties required by this Decree, the Chief Justice of this Court is herby authorized and empowered to appoint other Commissioners to supply such vacancies and he is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered that all the costs of the proceedings by said Commissioners under this decree, including a remuneration of not exceeding fifteen dollars ($15.00) per day and his reasonable expenses for each Commissioner whilst actually engaged in the performance of his duties hereunder, and the other costs incident to the running, locating, establishing and marking said line, shall be paid by the States of Maryland and West Virginia equally.

Third: That the cross-bill of the State of West Virginia, in so far as it asks for a decree fixing the North bank of the Potomac River as the boundary line between said States, be, and the same is, hereby dismissed.

Fourth: That this decree shall not be construed as abrogating or setting aside the compact made between Commissioners of the State of Maryland and the State of Virginia at Mount Vernon on the 28th day of March, 1785, and which was confirmed by the General Assembly of Maryland and afterwards by Act of the General Assembly of Virginia passed on the 3rd day of January, 1786, but the said compact, except so far as it may have been superseded by the provisions of the Constitution of the United States, or may be inconsistent with this decree, shall remain obligatory upon and between the States of Maryland and West Virginia, so far as it is applicable to that part of the Potomac River which extends along the border of said States, as ascertained and established by this decree.

Fifth: That each State shall be liable for her own costs and expenses already incurred or expended in this cause, and there shall be no recovery of said costs or any part of them by either of said States against the other.

Statement of Amounts Appropriated by the State of West Virginia to Pay the Costs and Expenses in the Suit of State of Maryland v. The State of West Virginia, in the Supreme Court of the United States for the Settlement of the Boundary Line Between said States.

Acts of 1893	$2,500.00
Acts of 1895	600.00
Acts of 1899	2,500.00
Acts of 1903	557.23
Acts of 1907	2,500.00
Acts of 1909	177.90
	$8,835.13

Office of Comptroller, Treasury Department,
Annapolis, Maryland, May 5th, 1910.

George E. Price, Esq.,
The Bradford Building,
Charleston, W. Va.

My Dear Sir:—Answering your letter of the 3rd received this morning, I beg to give you the amounts and the Acts authorizing the payment of the expenses in connection with the boundary line between Maryland and West Virginia, to wit:

Chapter 563 of 1890	$ 500.00	
Chapter 654 of 1894	1,000.00	
Chapter 365 of 1898	10,000.00	
Chapter 406 of 1898	5,000.00	
Chapter 809 of 1906	2,000.00	
Chapter 37 of 1908	10,000.00	$28,500.00

Respectfully yours,
J. W. Hering,
Comptroller.

Dictated
H. J. H.

IN THE

SUPREME COURT OF THE UNITED STATES.

NO. 1 ORIGINAL.

THE STATE OF WEST VIRGINIA.

VS.

THE STATE OF MARYLAND

BRIEF OF COUNSEL FOR WEST VIRGINIA ON POINTS INVOLVED IN THE SETTLEMENT OF THE FINAL DECREE.

There are three main matters of difference between counsel which have arisen in the preparation of the final decree in this cause.

HIGH OR LOW WATER MARK.

The first matter of difference is whether the boundary line between the states along the Potomac River shall be fixed at high water mark or at low water mark on the South bank, the Court having held that the river is within the territory of Maryland, and the language in the opinion not being entirely clear as to whether the line on the South bank shall be at high or low water mark, the counsel for each state has prepared the decree in accordance with their contention, respectively. On behalf of the State of West Virginia we claim that the line should be at low water mark, and in support of that contention we offer the following observations and authorities:

This question was elaborately considered and decided by the Board of Arbitration which settled the boundaries between the

States of Maryland and Virginia in 1877. The arbitrators were Hon. Jeremiah S. Black of Pennsylvania, Hon. Chas. J. Jenkins of Georgia and Hon. James B. Beck of Kentucky. Upon this question an award was agreed to by all three. Mr. Beck differed from the other two as to the boundary line across Chesapeake Bay but agreed with them as to the line along the Potomac River. That part of the award is expressed in the following language:

> "That the true line of boundary between the said States, so far as they are conterminous with one another, is as follows, to-wit:
>
> Beginning at the point on the Potomac River where the line between Virginia and West Virginia strikes the river *at low water mark*, and thence following the meanders of said river *by the low water mark* to Smith's Point at or near the mouth of the Potomac in latitude 37° 53′ 8″ and longitude 76° 13′ 46″; thence crossing the waters of the Chesapeake Bay, etc."

In the Opinion the following language is used:

> "When a river is called for as a boundary between two adjacent territories (whether Private property or public domains,) the line runs along the middle thread of the water. A concession of lands to a stream does not stop at one bank or cross over to the other, but finds its limit midway between them. But a river may be included or excluded if the parties choose to have it so. If the intent is expressed that the line shall be upon one bank or another, the mere force of construction cannot put it anywhere else. The natural interpretation is the legal and proper one.
>
> This is too obviously just to need the support of authority. But it is well illustrated by the Supreme Court of the United States, in the case of Ingersoll v. Howard, (13 How., 481) Alabama claimed to the middle of the Chatahoochee, by virtue of a boundary described in a concession from Georgia, thus: "Beginning on the western bank of the Chatahoochee River, where the same crosses the boundary line between the United States and Spain; running thence up the said River, and along the western banks thereof," &c. The Court held that these words established the line of boundary upon the western bank. There is some resemblance between that case and the one under consideration.

The northern boundary of Maryland is by the Charter to run westward to the true meridian of the first fountain of the Potomac. That point being ascertained, it shall turn at right angles and run towards (literally against) the south—*vergendo versus meridiem*"—Where "*ad ulierioram predicti fluminis ripam*"—to the further bank of the aforesaid river. Approaching the River from the north the further bank is the south bank of course. The description proceeds without a pause, thus: "*et eam sequendo qua plaga occidentalis ad meridionalem spectat usque ad locum quesdam appelatum Cinquack.*" Now, the words, "*eam sequendo,*" are a direction that something shall be followed in running the line between the point already fixed on the south bank of the Potomac, where it rises in the mountain and Cinquack, which is on the same side of the river, near to its mouth. What shall we follow? Clearly *eam ripam*, and clearly not *id flumen*, if we take the grammatical sense of the phrase. Another consideration impresses us a good deal. Lawyers, in the reign of Charles I. wrote Latin in the idiom of the vernacular tongue. We would naturally expect to see the thought of these parties expressed by words arranged in the English order, thus: *Ad ulteriorem ripam predicti fluminis et sequendo eam.* The other and more classical collocation was not adopted for its euphony, but for the sake of precision. It brought *ripam* and *eam* into close juxtaposition and made the antesession so immediate that it could not be mistaken. The interjected phrase, "*qua plaga occidentalis ad meridionalem spectat*" has had its share of the minue verbal criticism bestowed upon the whole document; but we see nothing in it except an attempt (perhaps not very successful) to describe the aspect of the western shore, where it turns to the south. Certainly there is nothing there which requires the line to leave the river bank. Apart from all this, it looks utterly improbable that the two termini of this line should both have been fixed on the south side of the river without a purpose to put the line itself on the same side. The intent of the charter is manifest all through to include the while river within Lord Baltimore's grant. It seems to us a clearer case than that decided in Ingersoll v. Howard.

For these reasons we conclude that the charter line was on the right bank of the Potomac, where the high-water mark is impressed upon it, and that line

follows the bank along the whole course of the river, from its first fountain to its mouth, and "*usque ad locum quendam appelatum Cinquack.*"

* * * * * * * * *

"If we are right thus far, it follows that the original line as fixed and agreed by the King and Lord Baltimore runs from Cinquack by a straight line to the extreme southwestern part of Somerset County, Maryland, which we find to be the true Watkins' Point of the charter, and thence by a straight line to the Atlantic Ocean. These lines will be seen on the accompanying map, marked and shaded in blue.

But this is not the present boundary. How firmly soever it may have been fixed originally, a compact could change it, and long occupation inconsistent with the charter is conclusive evidence of a concession which made it lawful herein.

Usucaption, prescription, or the acquisition of title founded on long possession, uninterrupted and undisputed, is made a rule of property between individuals by the law of Nature and the municipal code of every civilized country. It ought to take place between independent States, and according to all authority it does. There is a supreme necessity for applying it to the dealings of nations with one another. Their safety, the tranquility of their people, and the general interests of the human race do not allow that their territorial rights should remain uncertain, subject to dispute, and forever ready to occasion bloody wars. (See Vattel, Book II, Chapter 11, and Wheaton part II, chap. 4, sec. 4, citing Grotius Puffendorf and Rutherford.) The length of time which creates a right by prescription in a private party raises a presumption in favor of a state, that is to say, twenty years. (Knapp's Rep., 60 to 73.) It is scarcely necessary to add that the exercise of a privilege, the perception of a profit, or the enjoyment of what the common law calls an easement, has the same effect as the possession of corporeal property. It behooves us then, to see whether the acts or omissions of these states have or have not materially changed their original rights and modified their boundaries, as described in the charter. We will look first at the Potomac.

The evidence is sufficient to show that Virginia, from the earlies period of her history, used the South bank of the Potomac as if the soil to low water-mark had been her own. She did not give this up by her Constitution of 1776, when she surrendered other claims

within the charter limits of Maryland; but on the contrary, she expressly reserved "the property of the Virginia shores or strands bordering on either of said rivers, (Potomac and Pocomoke,) and all improvements which have or will be made thereon." By the compact of 1785, Maryland assessed to this, and declared that "the citizens of each State respectively shall have full property on the shores of Potomac, and adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements." We are not authority for the construction of this compact, because nothing which concerns it is submitted to us; but we cannot help being influenced by our conviction (Chancellor Bland notwithstanding) that it applies to the whole course of the river above the Great Falls as well as below. Taking all together, we consider it established that Virginia has a proprietary right on the south shore to low water-mark, and, appurtenant thereto, has a privilege to erect any structures connected with the shore which may be necessary to the full enjoyment of her riparian ownership, and which shall not impede the free navigation or other common use of the river as a public highway.

To that extent Virginia has shown her rights on the river so clearly as to make them indisputable."

It will be noted that the arbitrators were of opinion that the compact of 1785 applied to the whole course of the river above the Great Falls as well as below; therefore it applies to that part of the River between Maryland and West Virginia, and whilst West Virginia was not a party to this arbitration, and is not bound by the award, yet the State of Maryland is bound by it and has accepted it so far as the Potomac River lies between her and Virginia and it would seem that she cannot with very good grace ask for a different line to be established between her and West Virginia, having brought about through this arbitration the establishment of the low water-mark as the limit of her territorial rights under her charter, and under her compact with Virginia. Upon exactly the same state of facts existing between her and West Virginia, she would seem to be estopped to ask for a different decision from this Court. It is true that the arbitrators fix the line at low water mark because they consider it to have been so fixed by the compact of 1785, and by the acquiescence and exer-

cise of jurisdiction in accordance with this claim since the making of said compact, and they seem to announce that the charter line of Maryland did run to the high water-mark. They cite upon this question the case of Howard v. Ingersoll, 13 Howard 481.

This case does not sustain the position that the Maryland charter extended to the high water mark on the southern line. The language of the Maryland charter bearing upon this point is as follows:

> "Going from the said estuary called Delaware Bay in a right line in the degree aforesaid to the true meridian of the first fountain of the River Potomac; thence tending downward towards the south to the farther bank of said River, and following it to where it faces the western and southern coast as far as to a certain place called Cinquack situate near the mouth of the same river."

The Latin is:

> "Ad ulteriorum dicti fluminis ripam et eam sequendo."

The word "eam" being the feminine pronoun is claimed by counsel for Maryland to refer to the word "ripam" (bank) and that therefore the meaning is that the line was to come to the farther or south bank of the River and follow that bank to the mouth of the river. We doubt very much whether the person who wrote the charter had this in view, but even if that is the proper translation of the language, under the ruling of this court and the general law of nations it will not justify the holding that the line is to run with the high water-mark, and such is not the holding of this court in the case of *Howard* v. *Ingersoll*, 13 Howard 381, as we undrestand it. The holding in that case seems to be that the river belonged to the State of Georgia and that it included so much of the soil as constituted the bed of the river within its banks; that there was always in any riverawell defined line where the water permanently washes the bank; that this line was neither the extreme point where the high waters reached nor the lowest line to which they receded. They accordingly reversed the court which had instructed the jury that the line went only to low water mark. The language used by Mr. Justice Nelson on page 425

shows that the court did not intend to adopt in this case a different principle from that upon which the case of Handley v. Anthony was decided. 5 Wheat, 374, and his view is that the terms "ordinary low water-mark" properly describes the line which they intended to adopt in both of these cases.

In the case of *Handley* v. *Anthony*, 5 Wheat 374 the question was involved whether the State of Virginia owned the Ohio River to high water-mark or low water-mark on its northern bank and this court fixed the line at low water-mark. That case turned upon the construction of the cession of the northwest territory to the United States by Virginia; the language used was:

> "All rights, title and claim which the said Commonwealth had to the territory northwest of the River Ohio"

and it necessarily involved the question as to what constituted the Ohio River. This court, following the rule of convenience and justice adopted by the law of nations, limited the boundary of Virginia to the low water-mark, so that the State of Ohio would have access to and all the riparian rights along the north shore of the river; that the strip of land lying between the high and low water mark on the Ohio side should not be liable to be granted by the State of Virginia. All the considerations which lead to that conclusion apply to this case. The syllabus in the case of Handley v. Anthony, 5 Wheat 374, is as follows:

> "When a river is a boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream.
>
> But when as in this case one state (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly created state extends to the river only, and the low water-mark is the boundary. Handley's Lessees v. Anthony, 5 Wheat, 374."

This decision of this court has been followed by the Supreme Court of Appeals of Virginia and West Virginia in the following cases:

Garner's Case, 3.
Stave v. Plants, 25 W. Va. 119.
Ravenswood v. Fleming, 22 W. Va. 52.
Bridge Company v. Point Pleasant, 32 W. Va. 331.

And by this court in the cases of Henderson Bridge Company v. Henderson, 173, U. S. 592, Indiana v. Kentucky, 136 U. S. 479. We submit therefore that whether this question is to be governed by the compact made between Maryland and Virginia in 1785 or by the law of nations and the decisions of this court, and the other courts of this country, the boundary line is the low water-mark on the south bank of the Potomac River and not the high water mark.

THE COSTS.

The second matter about which counsel differed in the preparation of the decree is the payment of costs. The Court, in its opinion at the close, uses this language: "Costs to be equally divided between the States." We are not sure whether this language is intended to cover the costs of the litigation heretofore incurred or only the costs and expenses hereafter to be incurred of running and marking the line established by the Court, and if it is intended to cover the costs of the litigation there is some question as to whether those costs include the expenses of the surveys heretofore made in the cause by each State. By reason of this doubt in our minds, we have thought it proper to submit to the Court some considerations bearing upon these questions. We do not think that the State of West Virginia ought to be required to re-pay to the State of Maryland anything on account of the costs and expenses which she has already paid in the cause. We think it as as much as can be reasonably asked on behalf of the State of Maryland that each State shall pay its own costs. In point of fact, each State has heretofore paid its own costs and they are all settled, so fas as the persons to whom the costs were payable are concerned. We have obtained from the Comptroller of the State of Maryland a statement of the appropriations made by that State to pay the costs and expenses of this suit, and we file here with his letter showing that the total amount of the appropriations by the State of Maryland for this purpose was $28,500.00.

Less than $10,000.00 of this was used for printing the record, leaving something like $20,000.00 expended for expenses, and we presume nearly all of this was expended in surveying; a very large part of it in surveying the line called by the Maryland surveyors the "Potomac Line," extending from the point they designated as the "Potomac Stone or Spring," to the Pennsylvania line. On this line elaborate astronomical observations were taken by Dr. Bauer, and the line was marked by stones in a permanent way. We protested in our briefs and at the time that this was an unnecessary expense because all that was necessary in advance of the decision of the cause was to locate the spring head which they claimed, and then a point on the Pennsylvania line at the same distance from the Michler line as this spring is at the lower end, and then protract the line between these points. This would have answered every purpose as it was not claimed that this line had ever been run or that there were any marks or mounments on it which could be found by running it on the ground. This surveying was done in an elaborate manner, with an encampment and a retinue of attendants, whereas the surveying on behalf of the State of West Virginia was done at the least possible cost, the surveying party being content to put up at the houses of the inhabitants along the line. We also file herewith a statement showing the amount appropriated by the State of West Virginia for the costs and expenses of this suit, amounting altogether to $2,277.90.

It will be almost impossible to ascertain accurately what amount of money was spent by each State on these surveys, and which would be properly chargeable as the expenses of the surveys. It will involve probably a reference to a Commissioner or some other method of accounting, and we do not believe that this ought to be required. The State of West Virginia has substantially prevailed in this controversy, particularly on those questions which were most seriously contested, and it would seem that she ought not to be required to re-pay the State of Maryland any of the costs and expenses already expended by that State in this litigation. We do not really think that West Virginia ought to pay any part of the costs of printing the record, but as this is easily ascertained and is a part of the Court costs proper we can see that a different rule might be applied to it than that applied to other costs and expenses, such as surveying, procuring documentary proof and such like expenses.

DESCRIPTION OF BOUNDARY LINE.

At the time counsel for both States met in Washington on April 27th, 1910, to endeavor to agree upon a decree in this cause in accordance with the Court's opinion, on behalf of the State of West Virginia we submitted the draft of a decree which we had prepared, in which the line to be established by the decree was described substantially as follows in the first paragraph of said decree:

> "First: That the true boundary line between the States of Maryland and West Virginia is the Southern bank of the Potomac River at low water mark, extending from the common corner of Virginia and Maryland at or near Harpers Ferry, with the said Potomac River and with the North branch of said River at low water mark to the point where the line known as the Deakins or Old State Line, running Northerly from the Fairfax Stone crosses the said North branch of the Potomac, and running thence Northerly along the said Deakins or Old State Line to the Southern border or boundary line of the State of Pennsylvania."

Counsel for the State of Maryland objected to the description in two particulars. First, they insisted that the line should be at high water, instead of low water mark, along the Southern bank of the Potomac River. Second, they expressed the fear that if the line to be run Northwardly from the Fairfax Stone, or rather from the Southern bank of the North branch of the Potomac, North of the Fairfax Stone, should be simply designated as the Deakins or Old State Line it might be claimed that as the Deakins Map filed in the record shows that his line conformed to the Western boundary of the Maryland Military lots laid out by him, the line would be run under this decree to conform to the Western boundary of the Military lots *as they are now located and held*, and that this would include in the State of West Virginia territory which she has never held or claimed. We insisted that no such construction could be placed upon the language, because the proof in the cause shows that the Deakins or Old State Line does not conform to the Western boundary of the Maryland Military lots *as at present located and held*, except in a few instances, and the points proven to be on the Deakins or Old State line indicate that it is located independently in most places of these Military lots. After considera-

ble discussion, in order to satisfy the counsel for the State of Maryland that West Virginia did not claim the line to be located as they apprehended it would be claimed, we agreed substantially upon the language set forth in the first paragraph of the decree as it has been prepared and printed by the Attorney-General of the State of Maryland, in which the line is described as "running Northerly as near as may be along the line recognized and adopted by the people residing about or near the same as the boundary line between the States of Maryland and West Virginia; said line being at some points known as the Deakins Line and at some points as the Old State Line."

Upon further examination and consideration of this language, we are not satisfied with it. We fear that in construing this language the Commissioners will feel that they are to be governed entirely by what the people along the line claim to be the boundary line. Now, as the Court knows, there is at the present time some conflict of claims at a few points growing out of the running of the Michler line, and we think that such langauge should be used as to show that the controlling words are "the Deakins or Old State Line," as the Court manifestly intended in its opinion. We fear that the language "being at some points known as the Deakins Line and at some points as the Old State Line" might leave the inference that at other points it is known by other names such as the Michler line or the New Maryland Line; in other words, this language would permit the Commissioners to run the line merely according to the claims of the people residing along it, whereas the decision of the Court is that they are to locate and mark the Deakins or Old State Line as near as may be, and we think that this ought to be adhered to and that there will be no trouble about locating it without disturbing the holdings of any of the citizens. We have therefore taken the liberty to redraft this paragraph, and also the second paragraph as the Court will see. We think that the way we have prepared it, there can be no trouble or misapprehension as to its meaning or the duties of the Commissioners under it, but if the Court sees proper to incorporate into the first paragraph the language "as said line has been generally recognized and adopted by the people residing about or near the same as the boundary line between the States of Maryland and West Virginia" we are inclined to think this will not be misleading, and it will meet the point raised by counsel for the State of Maryland, though we have used this language in

the second paragraph in directing how the Commissioners shall run and locate the line.

In the original draft of the decree the line was described as extending from the common corner of the States of Virginia and Maryland *at or near Harpers Ferry.* We have changed this so as to read *"at or near the mouth of the Shenandoah River".* As we understand it, the line between Virginia and West Virginia is on the Eastern bank of the Shenandoah River and runs down to the mouth of the River. Harpers Ferry is West of the Shenandoah River and it is not sufficiently accurate to say that the common corner between Maryland and West Virginia is at or near Harpers Ferry.

We think it is more accurate to say at or near the mouth of the Shenandoah River. We are not, however, very particular on this point.

We did not realize until after we received the decree, as prepared by the Attorney-General of Maryland, that it was not acceptable to the State of West Virginia in the particulars above mentioned in regard to the description of the boundary line to be run, and we have not had an opportunity to confer with counsel for the State of Maryland since that time, but will submit a copy of this paper, with the decree as we have prepared it, to him at once and request him to indicate to the Court whether he objects to it or not.

WM. G. CONLEY,
Attorney General of West Virginia.
GEO. E. PRICE,
Assistant Counsel.